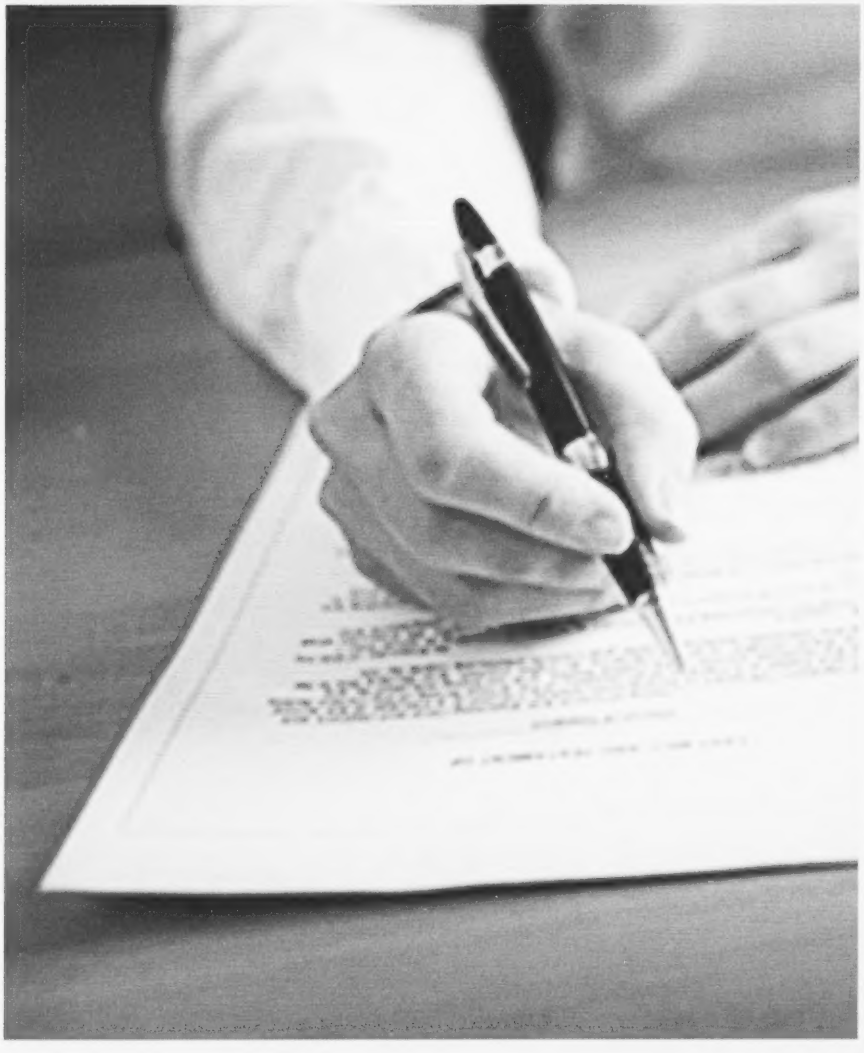
ALBERTA
LAW REFORM
INSTITUTE

ESTATE ADMINISTRATION



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FINAL REPORT 102

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on January 1, 1968 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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Acknowledgments

This report represents the final part of the Institute's work in the area of wills, succession and estate administration.

As we mentioned in Report for Discussion 22, there has been significant collaborative work and contribution from almost all Institute counsel over the course of this project. Each of those contributions has played a part in the content of this report and we wish to acknowledge the work of Cheryl Hunter Loewen, Maria Lavelle, Peter Lown, Donna Molzan, Sandra Petersson, Elizabeth Robertson and Geneviève Tremblay-McCaig.

Sandra Petersson and Peter Lown provided the overall project management and guidance. Maria Lavelle took on the challenging task of pulling together the disparate pieces into a coherent report. Ilze Hobin prepared the final report for publication, Melissa Preston provided footnotes and reference checking and final editing was done by Sandra Petersson.

We acknowledge with gratitude all of the contributions as well as the helpful input from our Advisory Committee, and the members of the North and South Wills and Estate Sections of the Canadian Bar Association, Alberta Branch, who responded to our constant surveys and questions.

Summary

In our Final Report on Estate Administration, ALRI makes a number of recommendations for reform of the *Administration of Estates Act*.

The objective of these reforms is to create clear, rational and accessible legislation that will provide guidance to estate representatives who are responsible for administering an estate.

In keeping with this objective, our report starts by providing a clear description of the role of the estate representative, beneficiaries and the court. The estate representative ensures the timely, efficient, and effective transfer of the estate property to the beneficiaries. The beneficiaries monitor the estate administration process. Generally, where a court is involved, it is at the front-end of the process. The court confirms who has authority to administer an estate and who requires notice. It does not, except where there are disputes, approve the plan for distributing the assets of the estate.

In order to carry out the role of the estate representative, certain qualities must be demonstrated. To avoid any confusion as to what is expected of an estate representative, our report expressly states the core duties of this position. Particularly important in the context where a layperson is acting as estate representative, this report expands on these core duties by providing a detailed task list. This task list is organized thematically and forms a useful starting point for anyone undertaking the administration of an estate

Finally, this report emphasizes the importance of communication to the estate administration process. Effective communication between the estate representative, the beneficiaries, and creditors is the key to a beneficiary-driven rather than a court-driven process. For this reason, it is a core duty of the estate representative and at the heart of many of the activities on the detailed task list. Communication ensures that the activities of the estate representative are transparent and that the beneficiaries are able to actively monitor the progress of the estate administration.

Recommendations

RECOMMENDATION 1

The new act should state that its purpose and that of the Rules is the timely, efficient and effective transfer of property to beneficiaries. 8

RECOMMENDATION 2

The new act should include a provision that sets out an estate representative's duty of care along the following lines:

In the administration of an estate, an estate representative must act in good faith and in accordance with the following:

(a) the terms of the will, where there is a valid will;

(b) the best interests of the beneficiaries, which may include an estate representative;

(c) this Act.

In the performance of the duty or the exercise of a power, whether the duty or power arises by operation of the law or the will, an estate representative must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person. 13

RECOMMENDATION 3

With respect to estate administration professionals, the new act should include a provision along the following lines:

When an estate representative, acting as a professional estate representative, possesses or ought to possess a particular degree of knowledge and skill that is relevant to the administration of an estate and that is greater than that which a person of ordinary prudence would exercise in dealing with the property of another person, the estate representative must exercise that greater degree of knowledge and skill in the administration of the estate. 13

RECOMMENDATION 4

The new act should require an estate representative to distribute the estate "as soon as practicable." 16

RECOMMENDATION 5

The new act should provide that an estate representative has a duty to communicate with the beneficiaries of an estate. 18

RECOMMENDATION 6

The new act should contain a provision that would enable beneficiaries to enforce the performance of an estate representative's core duties. The court would have the power to order an estate representative to perform the core duties and/or to impose conditions on the estate representative. Alternatively, the court could remove an estate representative. .. 18

RECOMMENDATION 7
The new act should include a listing of an estate representative's tasks arranged thematically. 25

RECOMMENDATION 8
The new act should require an estate representative to prepare an inventory of the estate assets. 29

RECOMMENDATION 9
The Rules should not require the filing of an inventory with the court as part of an application for a grant. In appropriate circumstances, a court may order the filing of an inventory. 29

RECOMMENDATION 10
The new act should require an estate representative to create and maintain records. 32

RECOMMENDATION 11
The new act should define "claimant" to include all persons with a claim against the estate other than as beneficiaries, statutory dependents with a claim under Part 5 of the *Wills and Succession Act* or a surviving spouse with a claim for matrimonial property division. 40

RECOMMENDATION 12
The new act should incorporate the existing provisions regarding who has the authority to control the disposition of human remains or cremated remains. In addition, that person's authority should be extended to include the authority to make arrangements for funeral, memorial or other services. 44

RECOMMENDATION 13
The new act should provide that a task of an estate representative is to identify who has the authority to control the disposition of human remains or cremated remains and to make arrangements for funeral, memorial or other services. 44

RECOMMENDATION 14
Whether or not an estate representative applies for formal authority, the new act should require an estate representative to notify all beneficiaries as to:

- *the identity of the deceased,*
- *the name of the estate representative, and,*
- *the nature of the gift left to them by the deceased's will or intestacy.* 51

RECOMMENDATION 15
Whether or not an estate representative applies for formal authority, the new act should require an estate representative to provide a copy of the will to all residuary beneficiaries 56

RECOMMENDATION 16

The new act should require estate representatives to report regularly to beneficiaries. The form and interval of the reporting should be left to the discretion of the estate representative but should occur annually, at a minimum. 59

RECOMMENDATION 17

The new act should eliminate the waiting period before an application for a grant of administration may be made. 74

Table of Abbreviations

LEGISLATION

Canada

Uniform Trustee Act	*Uniform Trustee Act* (2012), online: Uniform Law Conference of Canada <http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0029.pdf>

Alberta

Act	*Administration of Estates Act*, RSA 2000, c A-2
Rules	Alberta, *Surrogate Rules*, Alta Reg 130/1995
WSA	*Wills and Succession Act*, SA 2010, c W-12.2

Other Provinces

Newfoundland Act	*Judicature Act*, RSNL 1990, c J-4
BC Act	*Wills, Estates and Succession Act*, SBC 2009, c 13 (not yet in force)

Australia

Queensland Act	*Succession Act 1981* (Qld)

England

UK Act	*Administration of Estates Act, 1925* (UK), c 23

United States

UPC	Uniform Probate Code (2010)

LAW REFORM PUBLICATIONS

Australia Uniform Discussion Paper	National Committee for Uniform Succession Laws (Queensland Law Reform Commission), *Administration of the Estates of Deceased Persons*, Discussion Paper, Miscellaneous Paper 37 (1999)
British Columbia Succession Report	British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report 45 (2006)

British Columbia Probate Report	British Columbia Law Institute, *Report on New Probate Rules*, Report 57 (October 2010)
Nova Scotia Report	Law Reform Commission of Nova Scotia, *Probate Reform In Nova Scotia*, Final Report (1999)
Ontario Report	Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (1991)
Queensland Report	Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009)

SECONDARY SOURCES

Feeney	J MacKenzie, ed, *Feeney's Canadian Law of Wills*, 4th ed, looseleaf (Markham, Ont: Butterworths Canada, 2000)
Waters	Donovan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 3rd ed (Toronto: Carswell, 2012)
Widdifield	Carmen S Thériault, ed, *Widdifield on Executors and Trustees*, 6th ed, looseleaf (Scarborough, Ont: Carswell, 2002) (WL Can)

CHAPTER 1

Overview

A. Need for Reform

[1] Estate administration involves identifying the assets of a deceased person, paying their debts, and managing any remaining assets until they are distributed to the deceased's beneficiaries. The estate representative [ER] is the person who is charged with the responsibility of administering the estate, either according to the deceased's wishes as expressed in a valid will or according to intestacy legislation.[1] The person appointed as the ER may also be one of the beneficiaries under a will or intestacy. The ER may have little experience and may not be prepared for the important responsibility of administering the estate. Further, ERs may also risk personal liability if they do not properly discharge their responsibilities.

[2] Accordingly, it is important that the law governing the administration of estates be clear, accessible and rational. In particular, the legislation must be readily understood by non-lawyers who are seeking guidance on how to administer an estate.

[3] Anyone who assumes the role of administering an estate is an ER.[2] Depending on the nature and complexity of the assets, the ER may either distribute the estate without court approval or seek a formal grant of authority from a court before the estate is distributed.[3] Regardless of the approach taken, there are a number of functions that an ER must carry-out

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[1] This report adopts the term "estate representative" [ER] so as to better distinguish the responsibility of individuals administering the estate of a deceased individual from others. In Report for Discussion 22, ALRI used the "personal representative" [PR] to describe the person responsible for administering the estate. The feedback we received during consultation was that the use of this term was confusing. For example, "personal representative" is also used to describe the situation where living individuals are represented by a guardian, trustee or the Public Trustee.

[2] This report concerns assets that are to be transferred to beneficiaries either according to a will or on intestacy. This report does not address those assets that are transferred through will substitutes such as the beneficiary designation on a registered retirement savings plan.

[3] Except where the context requires, this report does not distinguish between estate administration carried out under a formal grant of authority and that done on an informal basis. However, the nature of some assets will require a formal authority. For example, the Land Titles Office requires formal authority where the estate consists of land. Banks or other financial institutions may also insist on a formal authority before they will release assets to the estate representative.

and communications that must be made before the administration of an estate can be completed.

[4] A May 2010 survey of Alberta wills and estates lawyers identified problems with ERs understanding their role. As one correspondent said, ERs "often don't know what to do, [there] seems to be a lack of information and knowledge from sources they have to deal with; often while also dealing with their own bereavement issues."[4] In addition to perceived shortcomings of the legislation in Alberta, the role of an ER is poorly understood across Canada. The Bank of Montreal conducted a survey that asked middle-aged Canadians about their understanding of the duties involved in estate administration. The results of the survey suggest that there is a great deal of confusion and misunderstanding on the part of the general public regarding what estate administration involves, the length of time involved, and other aspects of estate administration.[5] There are also a number of recent cases in which ERs have been found to have acted incompetently in administering an estate.[6]

[5] However, an ER would find little guidance in the current legislation governing estate administration in Alberta. The *Administration of Estates Act* does not clearly set out the core duties that should govern an ER's behaviour or set out in any detail the tasks they must perform.[7] The Act has remained relatively unchanged since it was first introduced in 1969.

[6] Further, people may appoint friends or family members as the ER, so often the ER must undertake estate administration duties while coming to terms with the death of a loved one. There is no doubt that an ER who is grieving will be affected "mentally, emotionally, physically,

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[4] Alberta Justice Legislative Reform, *Results from the Administration of Estates Survey* (June 2010) at 4. This was a joint initiative with the Alberta Law Reform Institute. The survey was sent to members of the Canadian Bar Association, Alberta Branch, Wills and Estates Sections.

[5] Bank of Montreal & Ipso Reid, "Boomers Baffled about What it Means to be Executor of a Will" (May 2007), online: CNW Group <http://www.newswire.ca/en/releases/archive/June2007/13/c3940.html>.

[6] See e.g. *Roberge v Roberge Estate*, 2004 MBQB 151; *Loftus v Clarke Estate*, 2001 BCSC 1136; *Laird v Lyne Estate*, 2004 BCSC 39; *Re Lowe Estate*, 2002 BCSC 813; *McClellan v. Pearase*, 2005 MBQB 289; *Eisenbeis (Estate of)*, 2005 ABQB 229; *Harrison v Zelezniak*, 2008 MBQB 8; *Cordeiro v Kulikovsky* [2003] OJ No 2668 (Sup Ct).

[7] *Administration of Estates Act*, RSA 2000, c A-2 [Act]. While section 58 teases with the heading "Duties and liabilities of legal representative", it merely states that the PR has all the powers of an executor. Nowhere is the role of an executor explained or defined.

behaviourally and spiritually."[8] Although the degree to which any particular ER will be affected cannot be predicted, if the bond between the ER and the deceased is strong it is likely that the ER will experience intense grief.[9] Thus, most friends or family members who take on the ER role will suffer to some extent from the frequent side effects of grief such as: confusion and sense of unreality associated with the physical shock of death;[10] both mental and physical exhaustion as a result of personal efforts to cope with the loss;[11] and the inability to function as an informed participant in market transactions.[12] This interference from the side effects of grief is a further reason to ensure that the legislation clearly sets out the ER's duties and responsibilities.

B. Challenges for Reform

[7] Additional challenges to reform stem from the historical development of the law in this area. Historically, court involvement in estate administration was confusingly divided across the ecclesiastical courts, the chancery court and the probate court. A probate court determined what was the last will and testament of the deceased and who should administer the estate, but it was left to a chancery court to determine the meaning and interpretation of testamentary documents.

[8] Second, the historical role of the courts in Alberta meant that the detailed procedural aspects of estate administration were contained in court rules. For some time, estate administration issues were dealt with as a separate part of the jurisdiction of the District Court, and then transferred to a separate court entitled the Surrogate Court, which was eventually merged with the Court of Queen's Bench.[13] As the *Surrogate Rules* are primarily procedural and have limited scope for substantive

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[8] Lynne Ann DeSpelder & Albert Lee Strickland, *The Last Dance: Encountering Death and Dying*, 8th ed (New York: McGraw-Hill Companies, 2009) at 313.

[9] John Archer, *The Nature of Grief: The Evolution and Psychology of Reactions to Loss* (London, UK: Routledge, 1999) at 177.

[10] Catherine M Sanders, *Grief: The Mourning After: Dealing with Adult Bereavement*, 2d ed (New York: John Wiley & Sons, 1999) at 50-51.

[11] John Archer, *The Nature of Grief: The Evolution and Psychology of Reactions to Loss* (London, UK: Routledge, 1999) at 104-105.

[12] James W Gentry et al, "The Vulnerability of Those Grieving the Death of a Loved One: Implications for Public Policy" (1995) 14:1 Journal of Public Policy & Marketing 128 at 129.

[13] *Court of Queen's Bench Act*, RSA 2000, c C-31, s 2(1.1).

effect, the result was an awkward legislative regime.[14] When the Act was finally adopted in 1969, it contained substantive provisions that could not be accommodated in the Rules. For example, the Act has a long list of specific powers that an ER might need to exercise in specific circumstances. The Act was also a convenient spot to locate additional specific responsibilities of the ER, such as the necessity to advertise for creditors and claimants.[15] While some substantive measures were covered in the Act, there were other more detailed matters of substance that were not included in the Act or the Rules. In a typical legislative scheme this level of detail, whether substantive or procedural, would have been dealt with in regulations under the Act. In the case of estate administration, however, the procedural Rules preceded any substantive legislation, act or regulations. As a result, there are gaps in the legislative scheme.

C. 1995 Reform of Surrogate Rules

[9] In 1995 the landscape changed considerably with the introduction of new Rules, which involved a complete rewrite of the old procedure based on a very different philosophy. There were two hallmarks to the new system. First, the ongoing supervisory role of the court was transformed into a front-end review of the due diligence of the ER that would justify the grant of authority. Second, the beneficiaries of the estate took over the monitoring role from the courts. Notice to those beneficiaries so that they could play such a monitoring role became a key component of the court's front-end review.

[10] Under this new system, when an application is made to the court, the role of the court is to determine at the outset who has the authority to administer the estate and to determine who needs notice. Unless there is a dispute, the court's role is not to pre-approve the plan of distribution. After this front-end review by the court, the beneficiaries monitor the timeliness and effectiveness of the distribution of the estate's assets. Where no formal court approval is sought, the courts are not involved; the beneficiaries continue to monitor the administration of the estate.

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[14] *Surrogate Rules*, Alta Reg 130/1995 [Rules]. Despite the merger of the Surrogate Court into the Court of Queen's Bench, the court rules dealing with estate matters are still referred to as the Surrogate Rules.

[15] Act, s 37; see also Rules, schedule 1, Part 1.

[11] While no longer a court supervised process, the content of an application for a grant of authority continued to require detailed information. The application must contain details of the will and the applicant for authority, an inventory of the estate assets, a listing of the beneficiaries, and all the required notices to beneficiaries, including those under other statutes such as the *Wills and Succession Act* and the *Matrimonial Property Act*.[16]

[12] Another major development in the change in procedure was the addition of a task list in Schedule 1 of the Rules for ERs and lawyers acting in estate matters. This was the first iteration in any Alberta legislation of the job of an ER. The intent was to establish the Rules as a comprehensive procedural guide for estate administration. To some extent, the procedures in the Rules superseded or at least paralleled many of the provisions of the Act. However, the underpinnings of the system, the role of the players involved and the objectives of the process were not found in the Rules or the Act, but instead in background materials, continuing legal education materials and other secondary sources. This highlights the difficulty in trying to create a complete legislative scheme. While procedure can be documented in Rules, the authority and rationale for many substantive requirements is easily overlooked. Further, now some 18 years after they were revised, the Rules are also showing signs of age and there is some scope for their rationalization and modernization as well.

D. The Succession Project

[13] This report represents the concluding stage in ALRI's Succession Project. ALRI has conducted numerous projects over the years to review various aspects of the law of succession and has made many recommendations for reform.[17] Many of those recommendations

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[16] *Wills and Succession Act*, SA 2010, c W-12.2 [WSA]; *Matrimonial Property Act*, RSA 2000, c M-8.

[17] Previous ALRI Reports which are currently relevant to succession law are:

Succession and Posthumously Conceived Children, Report for Discussion 23 (2012)
Estate Administration, Report for Discussion 22 (2011)
Wills and the Legal Effects of Changed Circumstances, Report 98 (2010)
The Creation of Wills, Report 96 (2009)
The Creation of Wills, Report for Discussion 20 (2007)
Exemption of Future Income Plans on Death, Report 92 (2004)
Report on a Succession Consolidation Statute, Report 87 (2002)

Continued

concerned the wills legislation in Alberta and are largely reflected in Alberta's new WSA.

[14] In this report, ALRI turns its attention to estate administration legislation. Other proposals for reform can be found in Report for Discussion No. 19, *Order of Application of Assets in Satisfaction of Debts and Liabilities*.

E. Scope of Changes Proposed in this Report

[15] In this report, ALRI recommends that the existing Act be replaced with new legislation that would apply to both formal estate administration (where court authority is sought) and informal estate administration (where no court authority is sought). This approach recognizes the practical reality that many estates are administered informally without seeking intervention by the courts. While this phenomenon is not new, the recognition that ERs need appropriate legislative guidance whether they are seeking court authority or not has been previously overlooked.

[16] This report makes a number of specific recommendations for change:

- First, in this chapter, Chapter 1, we recommend that both the legislation and Rules employ a consistent purpose. The rationale underlying both is the timely, efficient and effective transfer of property to beneficiaries through a beneficiary-driven (rather than a court-driven) process. We recommend the inclusion of a purpose statement to this effect in the legislation.

Order of Application of Assets in Satisfaction of Debts and Liabilities, Report for Discussion 19 (2001)
Wills: Non-Compliance with Formalities, Report 84 (2000)
Division of Matrimonial Property on Death, Report 83 (2000)
Reform of the Intestate Succession Act, Report 78 (1999)
Division of Matrimonial Property on Death, Report for Discussion 17 (1998)
Reform of the Intestate Succession Act, Report for Discussion 16 (1996)
The Matrimonial Home, Report for Discussion 14 (1995)
Effect of Divorce on Wills, Report 72 (1994)
Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act, Report 68 (1993)
Status of Children: Revised Report, Report 60 (1991)
Survivorship, Report 47 (1986)

- Second, in Chapter 2, we recommend clearly setting out the core duties that must govern the ER's behaviour in administering an estate. The ER must act in a fiduciary capacity, administer the estate in a timely manner and maintain communication with beneficiaries.
- Third, in Chapter 3, as an elaboration of the ER's core duties, we recommend including in the legislation a clear and rational statement explaining the process of estate administration and the ER's tasks. The starting point for this statement will be the current list of the ER's tasks in the Rules.
- Fourth, in Chapter 4, we stress the importance of communication by the ER with the beneficiaries. Communication arises in all aspects of the ER's job. The process of administering an estate is made easier for the ER and all involved if communication is open and effective. Open and effective communication also ensures that the beneficiaries are in a position to monitor the administration of an estate.
- Finally, in Chapter 5, we address two particular difficulties that the ER may face in starting to administer an estate: obtaining the release of preliminary information concerning an estate and the gap in authority when the ER's authority is not derived from a will.

[17] In those cases, where we conclude that the status quo is acceptable, no recommendations are made, as the existing provisions of the Act could be carried forward into the new legislation.

F. Purpose

[18] As described earlier, the 1995 reforms to the Rules created a comprehensive procedural guide for the administration of estates. However, as the Act was not amended at the same time, there was a resulting disconnect between the procedural provisions in the Rules and substantive provisions in the Act. The Act did not anchor the Rules by expressly articulating the purpose implicitly underlying the Rules.

[19] In this Report, we recommend unifying the Act and the Rules. As we stated earlier, both are driven by a common rationale - the timely,

efficient and effective transfer of property to beneficiaries through a beneficiary-driven (rather than a court-driven) process. It is this rationale that underpins all of the subsequent recommendations contained in this report.

[20] This Report also recommends that this rationale be clearly articulated in a purpose statement contained in the legislation. While purpose statements are not always included in the legislation, they can be particularly useful where the legislation is intended to serve as a guide not only for the legal profession but also for lay people. As described above, an ER may often be a family member or friend who does not necessarily have any professional training to prepare them for the ER role. The intent of this Report is to create legislation that clearly articulates the role and responsibilities of the ER. For this to be achieved, the ER needs to understand the over-arching purpose of the Act.

RECOMMENDATION 1

The new act should state that its purpose and that of the Rules is the timely, efficient and effective transfer of property to beneficiaries.

CHAPTER 2

The Core Duties of an Estate Representative

A. Introduction

[21] As someone trusted to deal with a deceased person's property, an ER does not have free reign to do whatever they like. ERs have core duties: they must act in a fiduciary capacity; administer the estate in a timely manner; and communicate with beneficiaries and other interested persons.

[22] However, it would appear that not all ERs are aware of or comprehend the importance of these core duties. First, there are a number of cases in which ERs have appropriated estate property for their own use, failed to account or keep an inventory, or paid themselves excessive management fees.[18] In these cases it would appear that the ER's fiduciary role is not well understood.

[23] Similarly, there is a general impression that ERs frequently fail to carry out their job in a diligent and timely manner. A survey of Alberta cases requesting a formal passing of accounts revealed a time span of administration from one to over twenty-six years with an average of approximately eight years and six months. However, this result has to be interpreted with caution as formal passing of accounts by the court is rare and may occur where there have been disputes between the ER and the beneficiaries, which may lengthen the time for administration.

[24] As well, the absence of, or dysfunction in communication can lead to difficulties in the administration of the estate. There are recent examples of ERs being taken to task for delayed and poor communication.[19]

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[18] See e.g. *Roberge v Roberge Estate*, 2004 MBQB 151; *Loftus v Clarke Estate*, 2001 BCSC 1136; *Laird v Lyne Estate*, 2004 BCSC 39; *Re Lowe Estate*, 2002 BCSC 813; *McClellan v Pearase*, 2005 MBQB 289; *Eisenbeis (Estate of)*, 2005 ABQB 229; *Harrison v Zelezniak*, 2008 MBQB 8; *Cordeiro v Kulikowsky*, [2003] OJ No 2668 (Sup Ct).

[19] *Babchuk v Kutz*, 2007 ABQB 88; *Petrowski v Petrowski Estate*, 2009 ABQB 753; *Re Foote Estate*, 2010 ABQB 197; *McDougald Estate v Gooderham* (2005), 255 DLR (4th) 435 (Ont CA).

[25] The question is whether including these core duties in the Act would further public awareness and set clear expectations for the conduct of an ER. To answer this question, each of the core duties will be considered in greater detail.

B. An Estate Representative's Fiduciary Duties

1. THE FIDUCIARY NATURE OF AN ESTATE REPRESENTATIVE'S ROLE

[26] An ER is a fiduciary.[20] A fiduciary must act for the benefit of others, must exercise powers diligently and may be personally liable for losses from the estate.[21] A fiduciary must not profit from the role, must not act out of self-interest and can only delegate administrative functions.[22] A fiduciary must act in good faith:[23]

> The fiduciary's obligations have been defined in a number of ways by the courts and commentators, but essentially it means the duty to account to another, who is the person with the right of enjoyment over the property in question, for all that one does with the property and in the office of trustee. Nothing may be done which is not directed solely towards the best interests of the trust beneficiary or beneficiaries.

[27] The primary obligation of a fiduciary is a duty of loyalty.[24] To ensure loyalty, the law does not allow a fiduciary to use the position to their advantage.[25] There are differing views in the academic literature and

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[20] The fiduciary nature of the role evolved from the supervision by the Court of Chancery of the administration of estates while the court was developing the law of trusts. The court tended to apply the law of trusts to estate administration: Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (1991) at 11-14 [Ontario Report]; Donovan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 3.IIA.3, online: WL Can [Waters].

[21] Waters at 3.I.A.; James MacKenzie, ed, *Feeney's Canadian Law of Wills*, 4th ed, looseleaf (Markham, Ont.: Butterworths Canada, 2000) at § 8.7 [Feeney].

[22] Waters at 3.IIA.4.

[23] Waters at 3.I.A. See also Karen A Platten, "Duties of Trustees, Executives and Attorneys" in *44th Annual Refresher Course: Wills & Estates* (Edmonton: Legal Education Society of Alberta, 2011) at 6.

[24] Maurice C Cullity, "Executors" in Institute of Continuing Legal Education, *Estates - Are You Now or Have You Ever Been a Fiduciary? A Look at the Various Forms of Fiduciary Relationships and Their Effect* (Ontario: Canadian Bar Association, 1994) at 25, with reference to Austin Wakeman Scott & William Franklin Fratcher, *Law of Trusts*, 4th ed (Boston: Little, Brown and Company, 1987) at § 170; Nancy L Golding, "Roles, Responsibilities and Wrist-Slapping: The Personal Representative in Estate Litigation" in *44th Annual Refresher Course: Wills & Estates* (Edmonton: Legal Education Society of Alberta, 2011) at 3.

[25] Robert Flannigan, "The Boundaries of Fiduciary Accountability" (2004) 83:1 Can Bar Rev 35 at 37.

the case law about who is a fiduciary, when the obligation arises, and the scope of the obligation.[26] The traditional view of fiduciary obligations is that they only operate negatively, in the duty to avoid conflicts of interest and the duty to not make unauthorized profits.[27] Under an alternative view, a fiduciary may be subject to positive obligations.[28] The nature of these positive obligations is evolving.[29]

[28] Currently, the Act does not expressly recognize an ER's role as a fiduciary or the duty of care to be followed. However, the nature of the role is hinted at in the Rules. For example, on an application for a grant, the applicant swears an affidavit that:[30]

> The applicant(s) will faithfully administer the estate of the deceased according to law and will give a true accounting of their administration to the persons entitled to it when lawfully required.

[29] In many cases, ERs are beneficiaries of the estate they are administering. There may be situations in which the ER's interests will conflict with that of the other beneficiaries. In such a case, the ER must recognize their fiduciary role and act fairly and in the best interests of all the beneficiaries.

[30] For example, a mother's will appoints her daughter as ER. The will gives a pearl necklace to the mother's other daughter. The ER remembers her mother telling her that she wanted the ER to have the necklace. How would the ER resolve these seemingly conflicting instructions? As a fiduciary, the ER must act honestly and disinterestedly and in the best interests of all beneficiaries. She must follow the directions in the will and give the necklace to her sister.

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[26] See e.g. of the literature outlining the confused state of the law: Robert Flannigan, "The Core Nature of Fiduciary Accountability" (2009) NZL Rev 375; Deborah A DeMott, "Fiduciary Obligation under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal" (1992) 30 Osgoode Hall LJ 471; Ernest J Weinrib, "The Fiduciary Obligation" (1975) 25 UTLJ 1; Leonard I Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" (1995-1996) 34:4 Alta L Rev 821; PD Finn, "The Fiduciary Principle" in TG Youdan, ed, *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1.

[27] Robert Flannigan, "The Boundaries of Fiduciary Accountability" (2004) 83:1 Can Bar Rev 35 at 47.

[28] RP Austin, "Moulding the Content of Fiduciary Duties" in AJ Oakley, ed, *Trends in Contemporary Trust Law* (Oxford: Clarendon Press, 1996) 153 at 163.

[29] See for example the discussion below on the obligation of a fiduciary to communicate.

[30] Rules, Schedule 2, Form NC 2.

[31] A further example is the situation where land falls into the estate residue. The ER is a residuary beneficiary along with two family members. The ER wants to sell the land but one of the two family members objects. Selling the land would not put the ER in a conflict as long as it was in the best interests of all the beneficiaries that the land be sold and the ER had informed the objecting beneficiary of the reasons for the decision.

[32] In a final example, the ER is a beneficiary under the will along with other family members. The ER decides that before the deceased's house can be sold, it should have a new roof. The ER employs their brother-in-law to do the job. The other beneficiaries agree that the roof needs replacing but object to the brother-in-law being hired. The ER can avoid the conflict of interest completely by not hiring their brother-in-law. However, provided that the roof replacement is done at a reasonable price and at a reasonable standard of quality the ER has not prejudiced the other beneficiaries' interests merely by hiring their brother-in-law. In each case the ER must ensure that their personal interests do not predominate over the interests of the estate or beneficiaries.

2. RECOMMENDATIONS FOR REFORM

[33] In our Report for Discussion, ALRI proposed that the Act include a provision that sets out an ER's duty of care. ALRI's proposal was universally supported during consultation. As one consultee pointed out, however, the inclusion of such a provision in the legislation does not obviate the need to educate potential ERs of their duties, particularly those who do not seek a formal grant of probate or administration.

[34] A similar proposal was made in the final report of the Western Canada Law Reform Agencies on enduring powers of attorney. The report recommended that the duty to act as a fiduciary be included in legislation. The report proposed that plain language be used to describe this duty.[31]This recommendation formed the basis for the language in our original proposal in our Report for Discussion.

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[31] Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Final Report (2008) at para 70.

[35] Based on the feedback received on consultation, however, we have modified the language in our original proposal to be more consistent with that of section 26 of the Uniform Trustee Act.[32] In particular, we note that section 26(3) of the Uniform Trustee Act also includes a higher standard for professional trustees who hold themselves out to the public as having particular skills to carry out estate and trust administration for remuneration. We agree that this same higher standard is appropriate in the context of a professional estate representative acting in that capacity to administer an estate.

RECOMMENDATION 2

The new act should include a provision that sets out an estate representative's duty of care along the following lines:

In the administration of an estate, an estate representative must act in good faith and in accordance with the following:

(a) the terms of the will, where there is a valid will;

(b) the best interests of the beneficiaries, which may include an estate representative;

(c) this Act.

In the performance of the duty or the exercise of a power, whether the duty or power arises by operation of the law or the will, an estate representative must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person.

RECOMMENDATION 3

With respect to estate administration professionals, the new act should include a provision along the following lines:

When an estate representative, acting as a professional estate representative, possesses or ought to possess a particular degree of knowledge and skill that is relevant to the administration of an estate and that is greater than

[32] *Uniform Trustee Act* (2012), s 26, online: Uniform Law Conference of Canada <http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0029.pdf> [Uniform Trustee Act].

> *that which a person of ordinary prudence would exercise in dealing with the property of another person, the estate representative must exercise that greater degree of knowledge and skill in the administration of the estate.*

C. Timely Administration

1. COMMON LAW

[36] Under the common law, an ER, once acting, must identify the assets and administer an estate without "undue or unreasonable delay."[33] The ER is personally liable for any loss as a result of delay. While there is no hard and fast rule as to what amounts to delay, the courts typically apply the concept of "executor's year." Under this concept, an estate should be reduced to possession, i.e. brought under the control and authority of the ER, and distributed to the beneficiaries within a year from the death of a testator in the case of a will or within one year from a grant of letters of administration. The idea was explained in the Alberta case of *Re Czaban Estate*:[34]

> The concept of the "Executor's Year" is a common law rule which allows the personal representative a one year period starting at the date of the testator's death to administer the estate and transfer the assets without any interest accruing to the beneficiaries. If the personal representative fails to realize any property within a year, the onus is on the personal representative to provide valid reasons for the delay.

[37] In *Irwin v Robinson*, the tenet was applied to a delay in administering an uncomplicated estate. The deceased had died five years earlier and the court stated:[35]

> This was not a large estate nor did the level of complexity increase the care and responsibility required of Irwin. The estate trustees should have been able to distribute the estate assets of this simple estate within the "executor's year". Instead, it took an inordinate amount of time for the estate trustees to administer this estate and the work has not yet been completed.

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[33] Feeney at § 8.17.

[34] *Re Czaban Estate*, 2005 ABQB 917 at para 21 [references omitted].

[35] *Irwin v Robinson*, [2007] OJ No 3831 (Sup Ct) at para 58.

[38] The courts will award interest to be paid on legacies after the expiration of the "executor's year" where there has been an unreasonable delay.[36]

2. PROVINCIAL LEGISLATION

[39] In Alberta, there is no provision which speaks to delay on the part of an ER. In some Canadian provinces, legislation requires the passing of accounts within a certain period of time which effectively imposes a time limit on administration. For example, in Saskatchewan the ER is required to "render a just and full account of the executorship or administration within two years after the grant of letters probate or letters of administration."[37]

3. OTHER JURISDICTIONS

[40] The executor's year remains in place in the United Kingdom under statute; the *Administration of Estates Act, 1925* provides that an ER cannot be required to distribute before the end of one year from the death.[38]

[41] Several Australian states have enacted provisions which maintain the concept of the executor's year under statute.[39] In addition, the Queensland *Succession Act 1981* puts an ER under a duty to distribute an estate "subject to the administration thereof, as soon as may be."[40]

[42] The National Committee for Uniform Succession Laws in Australia [Australian National Committee] has recommended that the provision on the duties of an ER include a provision that the ER has the duty "to

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[36] Feeney at § 8.18.

[37] *The Administration of Estates Act*, SS 1998, c A-4.1, s 35(1). See also *Judicature Act*, RSNL 1990, c J-4, s 129 [Newfoundland Act]; *Probate Court Practice, Procedure and Forms Regulations*, NS Reg 119/2001, ss 53-54 [Nova Scotia Regs].

[38] *Administration of Estates Act, 1925* (UK), 15 & 16 Geo V, c 23, s 44 [UK Act].

[39] There are provisions in Queensland, Victoria and Tasmania: National Committee for Uniform Succession Laws (Queensland Law Reform Commission), *Administration of the Estates of Deceased Persons*, Discussion Paper, Miscellaneous Paper 37 (1999) at 69 [Australia Uniform Discussion Paper] (also published as New South Wales Law Reform Commission, *Uniform Succession Laws, Administration of estates of deceased persons*, Discussion Paper 42 (1999) at para 8.44).

[40] *Succession Act 1981* (Qld), s 52(d) [Queensland Act].

distribute the deceased person's estate, subject to its administration, as soon as practicable."[41]

[43] The Uniform Probate Code in the United States requires that an estate should be settled and distributed "as expeditiously ... as is consistent with the best interests of the estate."[42] An additional section specifies that an ER must "proceed expeditiously with the settlement and distribution" of the estate.[43]

4. RECOMMENDATION FOR REFORM

[44] In the preceding section, we described three aspects of the timely administration of estates: (1) the general rule that distribution of an estate should occur within a year; (2) some requirement of periodic accounting; and, (3) an ER's obligation to act in a timely manner. We will discuss the accounting requirement further in the next chapter. The executor's year is a rule of thumb that is workable for the average estate, but may not be workable for more complicated estates or where there are legitimate reasons for delay. Accordingly, we focus on the more general requirement that an ER act in a timely manner.

[45] In our Report for Discussion, ALRI recommended the inclusion of an express provision requiring an ER to carry out the administration of an estate as soon as practicable. Such a statement would be consistent with the common law. There are precedents in the United Kingdom, the United States, Queensland and recent law reform recommendations in Australia. The section would serve to stress the importance of timely estate administration.

[46] During consultation, respondents who commented on this issue agreed with our proposal.

RECOMMENDATION 4

The new act should require an estate representative to distribute the estate "as soon as practicable."

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[41] Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) vol 4, at *Administration of Estates Bill 2009*, s 401 [Queensland Report].

[42] Uniform Probate Code § 3-703 (2010) [UPC].

[43] UPC at § 3-704.

D. Communication

1. COMMUNICATION ACTIVITIES

[47] The importance of communication in estate administration is best viewed by considering a number of typical activities:

- Can the ER effectively carry out their job without communicating their authority to act and the basis of their authority as being named in a will or being the highest priority person?
- In identifying the estate, can the ER effectively administer without communicating with asset holders?
- Can the ER effectively administer without communicating with potential creditors regarding the death of the deceased and their necessity to prove their claim, so that they can be paid?
- Can the ER effectively administer without communicating with beneficiaries, at least periodically, about the management of the estate assets?

[48] None of these activities can be carried out in isolation or silence. Even if we maintained the old system of court supervision, that alone would not guarantee a flow of relevant information to necessary parties. For these reasons, it is imperative to articulate as a core duty the need for the ER to communicate with relevant persons regarding the progress of the ER's activity. For the most part, this communication will take the form of direct reporting, for example, to competent beneficiaries, but it may also include indirect reporting to valid third parties such as a court appointed trustee or an attorney appointed under an enduring power of attorney.

2. RECOMMENDATIONS FOR REFORM

[49] Following consultation on this matter there was general agreement that the duty to communicate should be reflected as a core duty in the legislation. Accordingly, ALRI continues to recommend that the duty to communicate be expressly included in the Act. The crucial nature of this duty will be further developed in Chapter 4.

RECOMMENDATION 5

The new act should provide that an estate representative has a duty to communicate with the beneficiaries of an estate.

E. Non-Performance of Core Duties by an Estate Representative

[50] One issue that was not expressly addressed in our Report for Discussion, but which came up during the consultations, is the question of what recourse is available to beneficiaries where an ER refuses or fails to carry out a core duty.

[51] The current Act is silent on this issue. Under the common law, however, the courts have the inherent jurisdiction to order an ER to fulfill their duties. They also have the inherent jurisdiction to order the removal of an ER.[44] However, where a will names an executor, the courts are hesitant to interfere with the discretion of a testator to name an executor, and good reason must be shown for believing that the interests of the beneficiaries are in danger.

[52] In keeping with the beneficiary-driven nature of the process, ALRI recommends the inclusion of a provision that would facilitate the enforceability of the ER's core duties by the beneficiaries. While we appreciate the rationale behind the courts' reluctance at common law to remove an executor named in a will, we propose a provision that would empower the beneficiaries to seek redress in a wider range of circumstances.[45] This approach is consistent with a beneficiary-driven process and underscores the importance of these core duties.

RECOMMENDATION 6

The new act should contain a provision that would enable beneficiaries to enforce the performance of an estate representative's core duties. The court would have the power to order an estate representative to perform the core duties and/or to impose conditions on the estate

[44] Waters at 16.III.

[45] The proposed provision is based on a comparable provision found in the Uniform Trustee Act, s 78.

representative. Alternatively, the court could remove an estate representative.

CHAPTER 3

The Tasks of an Estate Representative

A. Introduction

[53] The ER must carry out a number of tasks to administer the estate and distribute the estate to the beneficiaries. At a meeting of Alberta wills and estate practitioners, it was indicated that the ER's responsibilities are not clear in the existing legislation and that this situation should be improved.[46] This chapter considers how the role of the ER can be clarified and made understandable. In particular, it considers whether the ER's task list should be moved from the Rules to the Act and whether any additional tasks should be included on the statutory list.

B. Outlining an Estate Representative's Tasks in the Act

[54] The responsibilities of the ER have developed over time through the courts. These tasks are an extension of the core duties outlined in the preceding chapter. The tasks of the ER can be detailed in various ways. For example, Feeney provides the following list:[47]

1. arrange for the disposal of the deceased's body;
2. schedule all the deceased's assets and ascertain their value;
3. arrange to have application made to the court of probate for the issue of proper grant of administration;
4. complete and file the required succession duty forms, if applicable;
5. advertise for creditors;
6. complete and file income tax returns;
7. pay funeral, legal and testamentary expenses and succession duties and income taxes, if any, as well as

[46] It is also worth noting that the majority of the Frequently Asked Questions on the Alberta Court of Queen's Bench website concern estate administration.

[47] Feeney at § 8.13.

> pay all outstanding debts and meet all uncompleted obligations of the deceased;
>
> 8. claim all debts due to the deceased and generally collect all the assets;
>
> 9. keep accounts; and
>
> 10. invest assets not properly invested and not required for the immediate purpose of administration.

Iterations of the ER's role vary, but in broad terms, the ER must collect the estate, administer the property, pay the debts and distribute the property of the deceased.[48]

[55] As noted earlier, one of the advances in the 1995 reform of the Rules was to include a task list to outline the ER's role. Recognizing the difficulties of including a substantive task list within the procedural content of the Rules themselves, the task list was included in a Schedule to the Rules and set out tasks for which the ER would be compensated.[49] This chapter considers whether the ER's task list, should now be moved to the Act and whether additional tasks should be included on the statutory list.

1. OTHER JURISDICTIONS

[56] Only one of the three Canadian law reform agencies to have issued reports on estate administration has recommended the inclusion of a provision outlining the tasks of the ER. In 1991, the Ontario Law Reform Commission recommended that:[50]

> 6. The estate trustee should hold the deceased's estate upon the following trusts:

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[48] New South Wales Law Reform Commission, *Uniform succession laws: Administration of estates of deceased persons*, Report 124 (2009) at 138-139 [New South Wales Report].

[49] Schedule 1 to the Rules provides that "estate representatives may receive fair and reasonable compensation for their responsibility in administering an estate by performing the estate representatives' duties" (s 1(1)). At common law, an estate representative was not entitled to compensation unless provision was made to do so in the will. Statutory exceptions to this common law rule were created in recognition that fair and reasonable compensation for duties performed are an exception to the general prohibition on an estate representative personally profiting from an estate they are administering (Feeney at § 8.9). For a more detailed discussion on compensation for estate representatives, seeVictoria Law Reform Commission, *Succession Laws: Consultation Paper - Executors* (2012).

[50] Ontario Report at 287-288.

(a) to exercise the powers conferred on her by law and by the will;

(b) to carry out the obligations imposed on her by law and by the will;

(c) to get in the estate of the deceased;

(d) to pay the debts of the deceased in accordance with the obligations imposed on her by law and by the will; and

(e) to distribute the estate of the deceased in accordance with the law and the will.

[57] The 1999 report by the Law Reform Commission of Nova Scotia did not discuss whether there should be a general provision outlining the duties of ERs.[51] Similarly, the 2006 report by the British Columbia Law Institute did not mention the issue.[52] However, though not yet in force, *Wills, Estates and Succession Act* contains a provision on the general duties of the personal representative.[53] Section 142(2) directs a personal representative to administer and distribute an estate, to provide an accounting, and to perform any other duties under the will or the law.

[58] In 1970, the English Law Commission recommended that the primary duties of ERs should be clearly stated in legislation. The Commission reasoned that such a provision would "make for simplicity and aid understanding."[54] As a result, the UK Act was amended in 1971.[55]

[59] Law reform agencies in Australia have made similar recommendations on a number of occasions.[56] In 1999, the Australian National Committee stated that a general provision on the duties of ERs would serve as a warning, but would not take away from other duties

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[51] Law Reform Commission of Nova Scotia, *Probate Reform in Nova Scotia*, Final Report 1999 [Nova Scotia Report]. See also Law Reform Commission of Nova Scotia, "Probate Reform in Nova Scotia" (1998-1999) 18:1 ETPJ 53.

[52] British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report 45 (2006) [British Columbia Succession Report].

[53] *Wills, Estates and Succession Act*, SBC 2009, c 13, s 142(2) (not yet in force) [BC Act].

[54] The Law Commission (England), *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report 31 (1970) at para 11.

[55] UK Act, s 25.

[56] Queensland Law Reform Commission, *The Law Relating to Succession*, Report 22 (1978) at 36; Australia Uniform Discussion Paper at 67-68.

under the common law.[57] Most recently in 2009, the Committee recommended that estate administration legislation should contain a statement of the duties of ERs. Such a provision stresses the significance of the various duties and informs the general public.[58] The New South Wales Law Reform Commission concurs with the utility of such a provision in outlining the general duties of ERs for the lay public.[59]

[60] The Australian states of Queensland and Western Australia have provisions on the duties of legal representatives in their estate administration legislation. The provision in the Western Australian legislation is modeled on the UK Act.[60]

[61] In the United States, the Uniform Probate Code contains extensive provisions on the duties and responsibilities of ERs. The general duties of an ER are expressed as follows:[61]

> A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this [code], and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this [code], the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

There is also a detailed list of the duties of an ER which is similar to the list contained in the Rules.[62] The commentary on the section states that it is beneficial to ensure that ERs have the necessary powers for the careful handling of the estate.[63]

2. RECOMMENDATION FOR REFORM

[62] In our Report for Discussion, ALRI proposed that the ER's task list, currently set out in a schedule to the Rules, should be moved to the Act. The rationale for this proposal was one of transparency and ease of use.

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[57] Australia Uniform Discussion Paper at 68.

[58] Queensland Report, vol 1 at para 11.19.

[59] New South Wales Report, note 48 at 138-139.

[60] *Administration Act 1903* (WA), s 43(1).

[61] UPC at § 3-703.

[62] UPC at § 3-715.

[63] UPC at § 3-715 (comment).

We recognized that the ER's job is a complex one and should not be further complicated by maintaining the task list at the end of the Rules. As the task list currently covers several substantive points or confers authority on the ER, it should be moved to the Act. During our consultation, there was general support for this proposal.

[63] The Rules task list provides an overview of the ER's role. It was not intended to be an exhaustive description of the ER's role nor could it ever aspire to be exhaustive within the procedural confines of the Rules. Moreover, given the variations among individual estates it would be impossible to craft a statutory task list that would cover all eventualities. Rather, the aim is to provide enough detail so as to assist the ER in understanding the main tasks to be done while providing sufficient flexibility to encourage and authorise the ER to act to address individual estate matters. Nevertheless, the Rules task list is an appropriate starting point for a statutory list.

[64] The Rules task list contains some twenty items. They are arranged in chronological order although it is not the order that all ER's would follow. In our Report for Discussion, we suggested that the task list would provide greater guidance to the ER if it were arranged thematically rather than chronologically. In consultation, there was general support for this proposal.

[65] A thematic arrangement would also provide flexibility to add to the task list as circumstance change. For example, what, if anything, should the ER do about any online assets that the deceased may have had such as websites, blogs or social media space? While there are suggestions that the ER should take control in these areas, this is still an emerging issue.

RECOMMENDATION 7

The new act should include a listing of an estate representative's tasks arranged thematically.

[66] Further, there will inevitably be additional provisions in the Rules that should be included in the ER's task list. The following sections consider a few such obvious instances: preparing an inventory, creating and maintaining records, providing financial statements, and advertising for creditors and claimants. It is anticipated that additional provisions in the Rules will be identified as Alberta Justice, in consultation with ALRI,

undertakes its review of the Rules. In addition, we consider later in this chapter whether arranging for the disposal of the body should continue to be included in the ER's task list and who should be responsible for making funeral arrangements.

[67] An example of what the ER's task list would look like can be found at the end of Chapter 4. It includes the tasks from the current Surrogate Rules Personal Representative's task list arranged thematically, as well as the additional tasks recommended in Chapters 3 and 4.

C. Preparing an Inventory

[68] Identifying an estate involves ascertaining the assets and liabilities of the deceased and potentially compiling a detailed list of the same. While it is clear collecting the assets is an important task of the ER, it is not as clear in the Rules task list whether, collecting an estate, includes preparing an inventory.

[69] In Alberta, when an application for formal authority is made, an inventory of the estate is filed with the court. In the past, the practice was to submit to the court a very detailed inventory including a precise description and the value of each asset. More recently, however, the Court has clarified that all that is required for the court is a general description of an asset and its value in the required form (Form NC 7). While assets must be valued at the date of death, this does not necessitate a formal appraisal by a third party. The value of an asset can be determined, for example, from a bank or brokerage statement in the case of bank accounts or investments; from a notice of assessment in the case of land; or simply by a reasonable estimate in the case of household goods and contents.

1. OTHER JURISDICTIONS

[70] The requirements with respect to inventories vary across Canada. Provinces with a requirement that an inventory be filed on a grant application include Manitoba, Newfoundland, Nova Scotia and Prince Edward Island.[64]

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[64] *The Court of Queen's Bench Surrogate Practice Act*, CCSM, c C290, s 24(1); Newfoundland Act, s 112; *Probate Act*, SNS 2000, c 31, s 57(1); *Probate Act*, RSPEI 1988, c P-21, s 48.

[71] Under the recently enacted legislation in British Columbia, an applicant for a grant of probate from a court is required to "make a diligent search and inquiry to find the property and liabilities of the deceased person" and to "disclose information as required under the Rules of Court concerning the property of the deceased person."[65] The proposed rules require an applicant to disclose the property within the estate, its value and any debts charged on a specific asset.[66]

[72] In some provinces, such as Ontario, an inventory as such is not submitted. Instead, the total value of the estate is required to enable the estate tax to be calculated.[67] However, in Ontario, it appears that the inherent jurisdiction of the court to require a detailed inventory has been preserved.[68]

[73] In 1999 an Australian law reform commission noted the following advantages to requiring a ER to prepare an estate inventory:[69]

- Knowing the value of the estate allows interested persons to determine whether they should apply for statutory relief,
- An inventory discourages the hiding of assets and promotes honesty,
- A comprehensive inventory (which includes foreign assets) can be informal and accurate, without requiring a detailed valuation of assets,
- An inventory can help identify estate assets in the future in the event of improper or incomplete administration, and
- An inventory provides the basis for the ER's accounting.

In Australia all states, except for Queensland, require that an inventory be filed with an application for a grant.[70] In Queensland, in common with the

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[65] BC Act, s 122.

[66] British Columbia Law Institute, *Report on New Probate Rules*, Report 57 (2010) at 64, subrule 39 [British Columbia Probate Report].

[67] Derek Fazakas, *Wills and Estates*, 2d ed (Toronto: Emond Montgomery Publications, 2004) at 117. Another example is New Brunswick which requires a total valuation: *Probate Court Act*, SNB 1982, c P-17.1, s 56.

[68] Ontario Report at 44.

[69] Australia Uniform Discussion Paper at 125.

[70] Queensland Report, vol 1 at paras 11.20-11.21.

United Kingdom, the requirement to file an inventory only occurs when required by the court.[71]

2. RECOMMENDATIONS FOR REFORM

[74] In our Report for Discussion, ALRI proposed that preparing an inventory be included as a task of identifying the estate. Whether the ER brings an application for a formal grant of authority or not, preparing an inventory is a critical early step for all the reasons outlined by the New South Wales Law Commission above. In consultation, there were no concerns raised with this recommendation.

[75] Concerns were, however, raised regarding the current requirement that an inventory be filed with the court as part of an application for probate. Why should an application for probate, including the inventory, be a public document, accessible by even those with no interest in the estate? This concern highlights a tension between the transparency of the court process and a testator's desire for privacy.

[76] To respond to this concern, one must consider the rationale for requiring the filing of an inventory. Filing an inventory ensures that beneficiaries are informed about the estate and allows for the determination of the probate fee. However, in a non-contentious case, while preparing an inventory is important, it is not clear that a formal filing should be required where the inventory can otherwise be communicated with beneficiaries. As we discuss in the next section, an ER is required to provide an accounting to beneficiaries that includes a detailed inventory of the assets in an estate. Similarly, only limited information is required in Alberta to calculate probate fees and it is not clear that a detailed inventory is necessary for this calculation.

[77] Accordingly, we recommend that in an application for a grant, an inventory should not be required to be filed with the court. The court may order that an inventory be filed in appropriate circumstances. An example of an appropriate circumstance would be the situation where a beneficiary is not satisfied with the level of detail in the inventory provided to them by the ER as part of the accounting. In such a case, the beneficiary could apply to the court for an order requiring the filing of a more detailed

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[71] Queensland Act, s 52(1)(b).

inventory, or for the passing of accounts in the court. This approach would be more consistent with a beneficiary-driven process.

RECOMMENDATION 8

The new act should require an estate representative to prepare an inventory of the estate assets.

RECOMMENDATION 9

The Rules should not require the filing of an inventory with the court as part of an application for a grant. In appropriate circumstances, a court may order the filing of an inventory.

D. Creating and Maintaining Records

[78] As part of the administration of an estate, an ER is required to prepare an accounting. An accounting details the manner in which the estate is being administered – the estate's assets and their value, the estate's debts and expenses, payments made to creditors, and the assets that have been distributed to beneficiaries. The Rules set out to whom the accounting must be made and at what intervals. This section considers whether the legislation should also require an ER to keep adequate records in order to facilitate the preparation of an accounting.

[79] Under the common law, an ER is required to keep accounts and to allow inspection of the accounts upon request. The accounts must detail every transaction accurately and the accounts can be subjected to a close examination.[72] In *Sandford v Porter*, the court stated that "[t]he duty of a trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required...."[73]

[80] The case law is unclear about the precise details of what has to be provided to the beneficiary who asks to see the accounts. It is also unclear as to whether the executor or administrator has to provide the beneficiary

[72] Carmen S Thériault, ed, *Widdifield on Executors and Trustees*, 6th ed (Scarborough, Ont: Carswell, 2002) (WL Can) at 13.1 [Widdifield].

[73] *Sandford v Porter*, [1889] OJ No 43 (CA) at para 21 (QL).

with a copy of the accounts or only the opportunity to inspect the documents.[74] The position seems to be that the beneficiary who desires a copy of the accounts must pay for the copy to be made.[75]

[81] The ability of the courts to require executors or administrators to pass their accounts originated in a statute passed during the reign of Henry VIII. The statute seems to have required executors and administrators to routinely display inventories to the court as a part of their tasks. From the beginning of the 19th century, the practice was not to require an accounting unless a court application had been made or the executor or administrator chose to voluntarily pass the accounts.[76] In *Kenny v Jackson*, the court stated that it was prudent for the executor or administrator to voluntarily pass the accounts to protect against liability.[77] Any interested person was able to ask the court for an accounting.[78]

> Any person interested in an estate, e.g., a next-of-kin, as being entitled in distribution, or a legatee or a creditor, may call upon the administrator or executor who has become the legal personal representative of the deceased to exhibit an inventory of the estate and render an account of his administration thereof.

[82] Section 45 of the Act provides that beneficiaries have the ability to obtain information by having the accounts passed on application to the court. This reflects the common law. The "persons interested in an estate" who may apply to have the accounts passed are defined in Rule 57 to include ERs, residuary beneficiaries, heirs on intestacy, unpaid creditors, and family relief applicants. In addition, Rules 55 and 58 allow an application to be made to the court on any contested matter by any interested person.

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[74] Ontario Report at 43.

[75] *Sandford v Porter*, [1889] OJ No 43 (CA), cited in Ontario Report at 43; Widdifield at 13.3.

[76] Charles Howard Widdifield, *The Law and Practice Relating to the Passing of Executors' Accounts* (Toronto: Carswell Company, 1916) at 1-2.

[77] *Kenny v Jackson* (1827), 162 ER 523.

[78] Thomas Hutchinson Tristram, *Coote's common form practice and Tristram's contentious practice of the High Court of Justice in granting probates and administrations*, 15th ed by Gordon L Simpson et al (London: Butterworth & Co, 1915) at 265 [footnote omitted].

1. OTHER JURISDICTIONS

[83] With respect to the keeping of accounts, an obligation to maintain accounts is found in the probate provisions of some provinces.[79] In Newfoundland and Labrador, accounts must be filed in the registry within one year after the issuing of a grant.[80] In some other provinces, accounts are only required to be filed if an application for a passing of accounts is made.[81]

[84] In its 1991 report, the Ontario Law Reform Commission recommended that a separate provision be included in legislation making the duty to maintain the necessary records express.[82] The Commission was particularly concerned that an inventory be created and kept current.[83]

[85] The Australian National Committee has recently made a similar recommendation in the same circumstances. They reasoned that many ERs are laypeople and thus it is advantageous to ensure that they are under a duty to maintain documents.[84] The Committee recommended that documents be maintained for three years following completion of the administration.[85]

2. RECOMMENDATION FOR REFORM

[86] In our Report for Discussion, ALRI recommended that creating and maintaining records should be included as a task of administering the estate. This task is a necessary prerequisite of the common law

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[79] See e.g. Nova Scotia Regs, s 57: "(1) A personal representative of an estate shall keep accurate records of all property and debts of the estate and all activity in the estate. (2) The accounts of an estate shall include..."; *Rules of Civil Procedure*, RRO 1990, Reg 194, r 74.17: "Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include...."

[80] Newfoundland Act, s 129; Nova Scotia has a similar provision with the alternative for the filing of releases, Nova Scotia Regs, ss 53-54.

[81] *Probate Rules*, NB Reg 84-9, s 3.08; *Court of Queen's Bench Surrogate Practice Act*, CCSM, cC290, s 4.

[82] Ontario Report at 46.

[83] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 74.18.

[84] In Queensland, the recommended legislation contains the duty to provide inventory and accounting in a separate provision: Queensland Report, vol 4 at *Administration of Estates Bill 2009*, s 402.

[85] Queensland Report, vol 1 at para 11.187.

requirement of accounting but would be made more transparent through inclusion in the Act.

[87] This proposal received a generally positive response during consultation. To address any concern that this would impose a significant cost on a small estate, it is worth clarifying that this is a requirement to maintain records. Access to these records would be limited to beneficiaries. This is not a requirement to account to the court, unless the ER wishes to do so, or is required to do so by court order initiated by the persons interested in the estate.

RECOMMENDATION 10

The new act should require an estate representative to create and maintain records.

E. Providing Financial Statements

[88] An accounting of an estate includes a copy of the estate's financial statements. Rule 97 provides that an ER must give financial statements, including a statement of assets and liabilities, to the residuary beneficiaries. These financial statements must be given at regular intervals of not less than two years after the date of death or after the last time financial statements were provided. Beneficiaries of specific gifts are only entitled to financial information in respect of the specific gift.

1. OTHER JURISDICTIONS

[89] The provision that periodic financial statements shall be given to beneficiaries is unique in Canada. For example, Ontario specifies that ERs must keep accounts, but does not provide for those accounts to be given to beneficiaries at regular intervals.[86] It is not found in the recent law reform recommendations for new probate rules made by the British Columbia Law Institute.[87] The recent law reform recommendations in Australia have not suggested provision of financial statements.[88]

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[86] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 74.17.

[87] See British Columbia Probate Report.

[88] New South Wales Report, note 48 at paras 6.45-6.47.

2. NEED FOR REFORM?

[90] In our Report for Discussion ALRI proposed that the requirement to provide financial statements be continued in the new act as a task of administering the estate. We also suggested that the current time frame of two year intervals was reasonable.

[91] While there was unanimous support from those who provided feedback to the provision of financial statements to beneficiaries, there were differences of opinion regarding the formality and timing of these statements. The vast majority supported the status quo. However, there were those who favoured more detail in the legislation concerning the form of the financial statements provided. Similarly, there were those who favoured a shorter timeframe or a timeframe that coincided with the interim or final distribution of the estate to residual beneficiaries.

[92] The Uniform Trustee Act sets out detailed requirements for trustees to provide financial reports to residuary beneficiaries for each fiscal period of the trust.[89] Some consulted, suggested that similar principles should inform the new act. In our view, the level of formality required and the timing, while appropriate where the ER is also a trustee, would be too onerous for many estates. Accordingly, ALRI is satisfied that the status quo should be retained.

F. Creditors and Claimants

[93] No distribution of an estate can be made to any beneficiary before monies owed to a creditor or other claimant of an estate have been provided for or paid. This section examines three issues concerning creditors and claimants: 1. Should advertising for claimants be mandatory or discretionary? 2. Where should advertisements for creditors be placed? And, 3. How should the term "claimants" be defined?

1. MANDATORY OR DISCRETIONARY ADVERTISING

[94] In Alberta, the Rules task list requires that the ER determine "whether to advertise for claimants." It is not mandatory that an ER

[89] See Uniform Trustee Act, s 28.

advertise for creditors and claimants, however, there are incentives to do so. Like Ontario, if an ER fails to identify a claim and distributes the estates, the ER will be personally liable to the claimants to the extent of the value of the estate, whether or not the ER had notice of the claim.[90] This liability can be avoided by complying with section 37 of the Act, which provides:

> Distribution of estate
> 37(1) On complying with the provisions of the Rules regarding advertising for creditors and claimants, the legal representative is entitled to distribute the property of the deceased person having regard only to the claims of which the legal representative has then notice and the legal representative is not liable to any person of whose claim the legal representative does not have notice at the time of the distribution of the property or part of it in respect of any such property so distributed.
>
> (2) Nothing in subsection (1) prejudices the right of a creditor or claimant to follow the property or any part of it into the hands of a person who has received it.

Similar protection is provided in sections 38(1)(h) and 38(2) of the *Trustee Act*, RSA 2000, c T-8. The Uniform Trustee Act contains similar provisions.[91]

[95] Rule 38 provides greater precision as to the form, content, placement and timing of the advertisement. If an ER decides to advertise for creditors or claimants they may use Form NC 34.[92] Advertisements must be placed in newspapers where the deceased usually lived or if the deceased did not usually live in Alberta, in the area where a significant amount of the deceased's property is situated.[93] The advertisement must be placed at least once or twice, depending on the value of the estate.[94] Creditors must make their claim within one month from the date of the

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[90] Ontario Report at 197-198, n 176.

[91] Uniform Trustee Act, ss 80-81. Note that unlike s 37 of the *Administration of Estates Act*, the trustee under the Uniform Trustee Act must apply to the court to distribute the trust property.

[92] Act, s 38(1).

[93] Act, s 38(2).

[94] Where the gross value of the estate is $100,000 or less, then notice must be advertised once: Act, s 38(3)(a). If it is more than $100,000 then notice must be advertised at least twice with 5 days or more between the publications: Act, s 38(3)(b). While the dollar value may appear to be low, it appears that this rule was last reviewed in 2010.

last advertisement or seek prior consent of the court to claim after that time.[95]

a. Other jurisdictions

i. Ontario

[96] As in Alberta, advertising for creditors in Ontario is left to the discretion of the ER. There is, however, an incentive to do so as section 53 of Ontario's *Trustee Act* protects an ER from personal liability for claims of creditors if the ER has adequately advertised for creditors.[96] In the case of intestacy, if an ER wants to distribute the estate within one year of the death, the ER must advertise for creditors. The Ontario *Estates Administration Act* provides that no distribution of an intestate's estate can be made until after the expiration of one year from the date of death, unless the ER has complied with section 53 of the *Trustee Act*.[97]

[97] There is "no legislative guidance as to the form, content, placement or timing of the advertisement, the time limits to be specified for the notification of claims, or the warnings to be given to claimants."[98] These are matters that are dealt with as a matter of practice. In general, the practice is to advertise at least three times in the local newspaper where the deceased lived and to allow at least thirty days since the date of the last advertisement before the estate is distributed. In its 1991 Report the Ontario Law Reform Commission noted there was some divergence of opinion with respect to this practice and recommended these details be included in legislation. To date, however, it does not appear that these recommendations have been implemented.

ii. British Columbia

[98] British Columbia has recently moved from a mandatory requirement of advertising for creditors and other claimants to one that is at the ER's discretion. Under the previous legislation, section 38 of the *Trustee Act* required advertisements to be published in successive weeks in a newspaper circulating where the deceased last resided in addition to

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[95] Rules, r 39.

[96] *Trustee Act*, RSO 1990, c T.23, s 53.

[97] *Estates Administration Act*, RSO 1990, c E.22, s 26.

[98] Ontario Report at 198.

a notice in the Gazette.[99] This approach was criticized as expensive and ineffective.[100] Accordingly, the British Columbia Succession Report recommended that a new provision should retain only a requirement to advertise once in the Gazette.[101] The report also urged changes to the accessibility of Part I of the Gazette in order to facilitate without subscription searches by the last name of the deceased.[102] It also recommended that the time for creditors to present claims should be extended from 21 to 30 days.[103] These recommendations are reflected in section 154 of the BC Act.

iii. Nova Scotia

[99] Advertising for creditors is mandatory under the Nova Scotia Act. Section 63(1) provides:

> 63(1) Before the payment of debts and expenses or distribution of an estate, the personal representative shall, by advertisement in the Royal Gazette for six months in such manner and at such times as is prescribed, call on all persons who have any demand upon the estate to file a claim within that six month period.

b. Need for reform?

[100] As described above, advertising for creditors is currently left to the discretion of the ER in Alberta, although there are incentives in terms of reduced personal liability for completing this step. Across Canada, advertising for creditors is generally left to the discretion of the ER, although there continue to be some jurisdictions in Canada, including Nova Scotia and Prince Edward Island, where advertising for creditors is mandatory.

[101] One reason for an ER to advertise is to notify claimants that the debtor has died and to advise them of the person to contact with respect to their claims. Similarly, advertising for claimants enables the ER to identify actual and potential liabilities before distributing the estate; advertising

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[99] *Trustee Act*, RSBC 1996, c 464, s 38.

[100] British Columbia Succession Report at 207, 253.

[101] British Columbia Succession Report at 207.

[102] British Columbia Succession Report at 207, 253.

[103] British Columbia Succession Report at 253.

also protects the ER from personal liability with respect to claims asserted after the estate has been distributed. This is of less significance where the ER is also the sole beneficiary of the estate, as a claimant may still advance a claim against the beneficiary.[104] However, where a creditor is not made aware of the death before the estate is partially or fully distributed, the creditor still has the option to:

- make a claim against the remaining assets in the estate;
- sue the ER; or
- follow the asset and make a claim against the beneficiary.

[102] In our Report for Discussion, ALRI proposed that advertising for creditors should continue to be left to the discretion of the ER. A provision similar to section 37 of the Act should be retained so that there is an incentive to advertise for creditors.

[103] Our consultation revealed general agreement with our proposal.

2. WHERE TO ADVERTISE

[104] As described above, in Alberta notices to creditors are to be placed in newspapers where the deceased usually lived or if the deceased did not usually live in Alberta, in the area where a significant amount of the deceased's property is situated. Most Canadian jurisdictions where advertising for creditors is discretionary include a similar provision. In those jurisdictions where advertising for creditors is mandatory, advertising costs are reduced by requiring that the advertisement be in the provincial Gazette rather than the local newspaper.[105]

a. Other jurisdictions

[105] Interestingly, the approach in British Columbia is an exception to this general trend. As noted above, British Columbia has moved from a mandatory advertising scheme to one that is discretionary. At the same time, it has moved from requiring that advertising for claimants be in

[104] Ontario Report at 199.

[105] Ontario Report at 201.

newspapers to requiring that the advertisement appear only once in the *British Columbia Gazette*.[106]

[106] The *Alberta Gazette* is published twice a month by the Queen's Printer. It is available in both an electronic and a hardcopy format and the cost of a subscription is inexpensive. The advertising rates are also considerably less than those of local newspapers.[107]

[107] The principal argument in favour of advertising in newspapers is that they are considered to be more accessible to individual creditors or small businesses than the provincial Gazette.[108] On the other hand, this form of advertising is more costly for the estate and time consuming for the ER.[109] There is also in general a decline in readership of print media; however, most newspapers and the provincial Gazettes are responding with online versions.

[108] In recommending a move to the provincial Gazette, BCLI noted that serial advertisements in newspapers are time consuming, expensive and no longer considered to be an effective means of notifying creditors.[110] They recommended a move towards only requiring an ER to advertise once in the provincial Gazette, but coupled this recommendation with recommendations to improve the ability of creditors to search the Gazette without a subscription.[111]

[109] The Ontario Law Reform Commission considered a procedure for providing public notice through the court clerk's office.[112] The proposal was to establish a register in the court clerk's office in which the clerk would record the relevant information concerning an estate. The onus would fall on the individual creditor to periodically search the register. In

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[106] British Columbia Succession Report at 207.

[107] A legal notice in the *Calgary Herald* newspaper costs approximately $3-12/line per day, depending on the style: *Calgary Herald*, "Calgary Herald Media Kit: Display Advertising Rates" (September 2012 – August 2013), online: Postmedia Network Canada Corp <http://www.calgaryheralddigitalmedia.com/mediakit/rate-card#notices>. In contrast, the *Alberta Gazette* charges $20 per month for a notice that is 5 or fewer pages: *Alberta Gazette*, "Alberta Gazette – 2013 Publication and Advertising Deadline Dates page" (2013), online: Service Alberta – Queen's Printer <http:// qp.alberta.ca/alberta_gazette.cfm?page=gazette_publication_dates.cfm >.

[108] Ontario Report at 201.

[109] Ontario Report at 201.

[110] British Columbia Succession Report at 207, 253.

[111] British Columbia Succession Report at 207, 253.

[112] Ontario Report at 201.

addition, the register index would be published periodically. The Ontario Law Reform Commission ultimately rejected this proposal as being costly and ineffective. They noted that such a proposal would only be relevant where an application had been made to the court for an estate trustee certificate grant of probate.[113]

b. Need for reform?

[110] In our Report for Discussion ALRI stated that it would be interested in views as to whether or not it would be more effective to advertise for creditors in the Alberta Gazette, rather than in local newspapers.

[111] On consultation, those who responded to this question were unanimous that advertising in local newspapers was a more effective way of notifying creditors than the provincial Gazette. ALRI considered whether advertising in either the Alberta Gazette or local newspapers was an effective way to notify creditors or whether its principal benefit was as a failsafe device for estate administrators. This question remains unresolved. For the time being, however, our view is that advertisements for creditors should be in local newspapers. We acknowledge that at some point new forms of media could supersede the role of the local newspaper, but this point could be addressed through a change in the regulations.

3. CREDITORS AND OTHER CLAIMANTS DEFINED

[112] A further consideration is who qualifies as "creditors and other claimants"? No distribution of an estate can be made to beneficiaries before the debts and liabilities of an estate have been provided for or paid to creditors and other claimants. There is no definition of "claimant" in the Act, however, claimants are referenced in section 37(1). Rule 1(c) of the Rules provides that claimants include creditors. Would claimants include statutory claimants for family maintenance and support or matrimonial property division? Others with a claim against the estate? What about beneficiaries?

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[113] Ontario Report at 202.

a. Other jurisdictions

[113] The Ontario legislation does not define "claimants." In its 1991 Report, the OLRC recommended that claimant should be defined so as to include creditors:[114]

> "[C]laimant" should be defined to mean a person who has a claim against the estate of the deceased, whether arising prior, or subsequent, to the death of the deceased, in respect of a contract, tort, property interest in any property of the deceased, or any other cause, whether the claim is contingent or not, liquidated or unliquidated, secured or unsecured, matured or unmatured.

[114] The BC Act takes a different approach. It defines "claimant" so as to exclude either a will or intestacy beneficiary. Section 154(1) provides:

> 154(1) In this section, "claimant" does not include a person who has commenced proceedings to determine whether he or she is a beneficiary or an intestate successor.

b. Recommendation for reform

[115] In our Report for Discussion ALRI proposed that the Act define "claimant" broadly so as to include all persons with a claim against the estate other than beneficiaries. However, the definition should also exclude statutory dependants with a claim for matrimonial property division or a claim under Part 5 of WSA. There was general agreement with this proposal on consultation. (It is noted that this recommendation would also necessitate a consequential amendment to the definition of "claimant" in the Rules.)

RECOMMENDATION 11

The new act should define "claimant" to include all persons with a claim against the estate other than as beneficiaries, statutory dependents with a claim under Part 5 of the *Wills and Succession Act* or a surviving spouse with a claim for matrimonial property division.

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[114] Ontario Report at 197 [footnote omitted].

G. Funeral Arrangements and Disposing of the Body

[116] Arranging for the disposal of the body is an important immediate task. It is listed as the first item on the Rules task list. Indeed, at common law, it is the executor's duty to take possession of the body and make burial plans.[115] Where there is no executor, as on intestacy, the common law is not clear whether the next-of-kin have a duty to dispose of the body and make funeral arrangements.[116] This uncertainty has been resolved, in part, by legislation in Alberta. The legislation specifies who has the authority to control the disposition of human remains and cremated remains, but is silent with respect to who has the responsibility for making funeral arrangements.

1. WHO HAS AUTHORITY?

[117] In Alberta, the *General Regulation (Funeral Services)* provides the following authority:[117]

> 36(2) Subject to an order of the Court, the right to control the disposition of human remains or cremated remains vests in and devolves on persons in the following order of priority:
>
> (a) the personal representative designated in the will of the deceased;
>
> (b) the spouse or adult interdependent partner of the deceased if the spouse or adult interdependent partner was living with the deceased at the time of death;
>
> (c) an adult child of the deceased;
>
> (d) a parent of the deceased;
>
> (e) a guardian of the deceased under the *Adult Guardianship and Trusteeship Act* or, if the deceased is a minor, under the *Child, Youth and Family Enhancement Act* or the *Family Law Act*;

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[115] Legal Education Society of Alberta, *Alberta Estate Administration* (2005) at 2-12; Widdifield at 1.1.

[116] John Ross Martyn & Nicholas Caddick, eds, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, 19th ed (London: Sweet & Maxwell, 2008) at 6-01.

[117] *General Regulation*, Alta Reg 226/1998, s 36(2)-36(4) (the enabling statute is the *Funeral Services Act*, RSA 2000, c F-29). The core services in Schedule 1 of the Rules lists "making arrangements for the disposition of the body" as one of the ER's tasks. To the extent that this presents an inconsistency, the more recent and more specific *General Regulation (Funeral Services)* would prevail.

(f) an adult grandchild of the deceased;

(g) an adult brother or sister of the deceased;

(h) an adult nephew or niece of the deceased;

(i) an adult next of kin of the deceased determined on the basis provided by sections 67 and 68 of the *Wills and Succession Act*;

(j) the Public Trustee;

(k) an adult person having some relationship with the deceased not based on blood ties or affinity;

(l) the Minister of Human Services.

(3) If, under subsection (2)(c) to (h), the right to control the disposition of human remains or cremated remains passes to persons of equal rank, in the absence of agreement between or among them, the order of priority begins with the eldest person in that rank and descends in order of age.

(4) If the person who, under this section, has the right to control the disposition of human remains or cremated remains is not available or is unwilling to give instructions, that right passes to the next available qualified person.

However, it does not appear that this regulation is well known. uncertainty over who had authority to dispose of the body was a recurring theme in our consultations. Moreover, this legislation was overlooked in recent litigation regarding control of human remains.[118]

[118] Although poorly known, the current regulation outlines an appropriate list of persons with authority to dispose of a body. If the deceased opted to appoint an ER by will then the ER has the authority to dispose of the body. If no ER is appointed by will, authority falls to the deceased's family members in order of priority. This listing parallels the list of those who would have authority to administer the estate if there were no will. However, the regulation has the important distinction of

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[118] In *Johnston v Alberta (Director of Vital Statistics)*, 2008 ABCA 188 the mother of an RCMP officer, who was slain while on duty, objected to having his body disinterred and moved to an RCMP cemetery as had been requested by his widow. The Alberta Court of Appeal affirmed the reviewing judge's decision that the widow was the first in priority under the common law and the Director of Vital Statistics Policy (with the *Cemeteries Act* being the underlying statute) and her priority prevailed. There was no mention that the widow also had higher priority than the mother to make the initial decision under the *General Regulation*, Alta Reg 226/1998 (*Funeral Services Act*).

giving authority to the oldest member of a class if the class members cannot agree; this priority recognises that there is time sensitivity in disposing of a body and that one person must be authorised to make a decision if there is no agreement.

[119] On the other hand, where there was a will but the will did not provide for an ER (i.e. administration with will annexed) the list of persons in the regulation differs from the list of those who would have authority for administering the estate; however, there are good policy reasons for doing so. To match the list of authority to dispose of the body to persons with authority as ER outside of the will would produce inappropriate results in some cases. For example, if the deceased's will named the Local Community Foundation as a residuary beneficiary then the Foundation would likely have authority to act as ER if there were no other ER named in the will. However, it does not follow that the Foundation should be authorised to dispose of the body. To do so would not only be problematic for the Foundation but would also be insensitive to the grieving family and friends of the deceased. The current list of those with authority to dispose of the body reflects the close link between the deceased and the deceased's family that exists in the vast majority of cases. The same rationale would apply to extending the responsibility for making funeral arrangements to the persons named on this list.

2. RECOMMENDATION FOR REFORM

[120] The ER may or may not have authority to dispose of the body by virtue of the funeral services legislation. Accordingly, in its Report for Discussion, ALRI did not recommend that disposal of the body should be included in the ER's task list in the new act. However, it noted that it might assist ERs and the deceased's family members if the Act were to contain an appropriate cross-reference to the funeral services legislation. ALRI sought views as to how the two areas of legislation might be better coordinated.

[121] The comments provided on consultation were overwhelmingly in favour of the inclusion of the legislative authority to make funeral arrangements and to dispose of the body (or to arrange for disposal of the body) in the Act. However, there was disagreement as to whether this authority should go to the ER or whether list of persons in the funeral services regulation was more appropriate. There were those who favoured

its inclusion as a task of an ER in recognition that in most cases it falls to the ER to complete this task and as the costs of this step impact the administration of the estate. Others were of the view that the list of authority in the funeral services regulation was more appropriate and should be incorporated or cross-referenced in the Act.

[122] While in most cases this task will fall to the ER, as indicated above, there are occasions when the ER would not be appropriate. The list in the *General Regulation (Funeral Services)* is more appropriate; however, it is relatively unknown. Accordingly, we recommend that the new act incorporate this list as a separate provision and extend the authority of the person entitled to dispose of the body to include making arrangements for funeral, memorial or similar services. We have also added to the ER's task list the responsibility for identifying who has the authority to dispose of the body (or arrange for the disposal of the body) and to make funeral arrangements.

RECOMMENDATION 12

The new act should incorporate the existing provisions regarding who has the authority to control the disposition of human remains or cremated remains. In addition, that person's authority should be extended to include the authority to make arrangements for funeral, memorial or other services.

RECOMMENDATION 13

The new act should provide that a task of an estate representative is to identify who has the authority to control the disposition of human remains or cremated remains and to make arrangements for funeral, memorial or other services.

H. Summary

[123] In the course of this chapter, ALRI has recommended that the ER's task list currently stated in a schedule to the Rules should be moved to the Act. The list should be arranged thematically according to the main areas of collecting the estate, administering the estate, paying the debts and distributing the estate to the deceased's beneficiaries. ALRI has also recommended the inclusion of three additional items on the task list:

- preparing an inventory of the estate's property and liabilities,
- creating and maintaining records,
- providing financial statements, and
- identifying who is responsible for disposing of the body (or arranging for the disposal of the body) and for making funeral arrangements.

These tasks are essential to the proper and effective administration of an estate and are sound, common sense practices. Preparing an inventory and financial statements are already required where an ER applies for formal court authority. Adding the requirement to create and maintain records of how the deceased's property is dealt with will facilitate preparing the financial statement as required.

[124] Finally, ALRI has recommended that the new act should set out who has the authority to arrange for the disposal of the body. While this task will often fall to the ER, disposal of the body should not be included in the ER's task list. Disposal of the body should be included as a separate provision to recognize those situations where someone other than the ER has a higher priority claim to deal with the deceased's remains. The ER is, however, best placed to determine who should be responsible for disposing of the body (or arranging for the disposal of the body) and this task has been added to the task list.

[125] Further, it would be helpful to draw the ER's attention to the fact that he or she will be subject to other duties imposed by common law or legislation. For example, the WSA requires an ER to provide notices to all family members of the deceased regarding any applications made against the estate for maintenance and support.[119] Similarly, under the *Devolution of Real Property Act*, an ER must hold any real property of the estate as a trustee.[120] Accordingly we would also propose that the list of the ERs tasks should include a statement along the lines of "and any other duties required by law or under a valid will." This would alert ERs to the fact that their duties are not exhausted by the Act.

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[119] WSA, s 91.

[120] *Devolution of Real Property Act*, RSA 2000, c D-12, s 3.

CHAPTER 4

Communication

A. Introduction

[126] As noted in Chapter 2, effective communication is key in administering an estate. The current Rules task list contains some communication tasks such as notifying beneficiaries of their interest in the estate. However, in moving the task list from the Rules to the Act, it is appropriate to give more attention to the ER's role in communication. It is also important to keep in mind the 1995 shift in focus from a court-monitored to a beneficiary-monitored process. In that context it is appropriate to consider what information the ER needs to provide to beneficiaries so that they can monitor their interests. This chapter considers communication between the ER and beneficiaries as well as between the ER and other interested parties.

[127] The main features of the ER's current obligation to give notice in Alberta are that:

- Notices are given to beneficiaries in connection with a court application for formal authority;
- Notices are provided to some statutory claimants, depending on the particular legislation;
- Giving notice alerts the beneficiaries to the need to monitor their interests in the estate;
- The information contained in the notice varies depending on the recipient;
- The duty to give notice may be mandatory or optional, again depending on the recipient; and,
- There is no clear timeframe for giving notice.

B. Notifying Beneficiaries

1. CURRENT INFORMATION REQUIREMENTS

[128] Under the current law, as part of an application for formal authority, the information provided by the ER to a beneficiary depends on the type of beneficiary and is tailored to meet court requirements. Some notices contain basic information, some include complete information about the estate and administration details, and some fall in the middle with the ER providing basic information and partial estate administration information.

a. Basic information

[129] All beneficiaries receive basic information about the estate if an application for formal authority is made to the court. In particular the notices state the following:[121]

- identity of the deceased,
- name of the ER,
- that an application for formal authority has been made by the ER, and
- that the notice recipient may receive property gifted to them by the deceased or may otherwise have a claim against the estate assets.

b. Partial estate information – specific beneficiaries, others

[130] Persons to whom the deceased made specific gifts, (the specific or non-residuary beneficiaries) receive the basic information plus partial estate information concerning only the specific estate asset that the deceased gifted to the recipient.[122]

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[121] Rules, Schedule 3, Forms NC 19-24.1, 34.

[122] Rules, Schedule 3, Form NC 20; Act, s 97(4).

c. Complete estate information – residuary beneficiaries or beneficiaries on intestacy

[131] Residuary beneficiaries and beneficiaries on intestacy receive the basic information and a copy of the completed application for formal authority.[123] A review of the requirements for making an application and the mandatory content of related forms indicates that the following items are part of a complete application:[124]

- a copy of the will (if any),
- an inventory of estate assets and debts,
- information concerning the identity and address of each person beneficially interested in specific and other estate assets,
- the names and addresses of each person who may have a statutory claim (e.g. for family maintenance and support or matrimonial property division), and
- the time period for making statutory claims against the estate.

[132] The notice to a residuary beneficiary draws attention to the fact that the application includes a copy of the will and a list of estate property and debts.[125] The notice to a beneficiary on intestacy also notes that a list of property and debts is part of the application.[126]

2. RECOMMENDATION FOR REFORM

[133] Moving the notice requirement from the Rules to the Act is a logical extension of the current requirements for notice to beneficiaries where a formal application is made. However, all beneficiaries need to know of their interests in the estate and such communication should not be limited to those where a formal application has been made. Beneficiaries cannot enforce their rights and monitor the administration of an estate unless they are aware that they are entitled to estate property. Where the beneficiary's interest arises from the deceased's will, providing

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[123] Rules, Schedule 3, Forms NC 19, 21.

[124] Rules, r 13.

[125] Rules, Schedule 3, Form NC 19.

[126] Rules, Schedule 3, Form NC 21.

information about the beneficiary's interest also reflects and respects the deceased's wishes.

[134] Accordingly, in our Report for Discussion ALRI proposed that, whether or not an ER applies for formal authority, the ER should be required to notify all beneficiaries as to:

- the identity of the deceased,
- the name of the ER, and
- the nature of the gift left to them by the deceased's will or intestacy.

This information would be in addition to any notices given to beneficiaries who have statutory claims for family maintenance and support or matrimonial property division.

[135] ALRI further proposed that in cases where there is no will, notices to intestate beneficiaries should include a reference to the specific provision of the WSA by which ownership of the deceased's property transfers to intestate beneficiaries.

[136] Finally, in all cases the notice should clearly state that all gifts are subject to the prior payment of the deceased's debts and other claims against the estate.

[137] In consultation there was general support for this proposal, however, a number of additional points were raised which merit some discussion. First, there was a suggestion that the contents of the notice should include whether or not the ER is applying to the court for formal authority to administer an estate. ALRI considered this suggestion, but concluded that including this requirement could delay the provision of notice until this determination is made.

[138] Second, where the ER is not applying for a grant of authority it was suggested that a form should be created to bring uniformity and consistency to the manner in which the notice to beneficiaries is provided. ALRI's view is that, aside from setting out the contents of information to be included, the manner in which the notice is provided does not need to be formalized. A form could be developed for guidance purposes only. Informal notice could be as effective as formal notice outside of the court setting.

[139] Third, there was a request for clarification whether notice to beneficiaries would extend to contingent beneficiaries (e.g. a trust with a gift-over provision to a grandchild). ALRI's view is that the notice requirements should not extend to contingent beneficiaries. This approach is consistent with the Uniform Trustee Act and reflects practical difficulties in identifying and contacting contingent beneficiaries.[127] Where feasible, however, notification of contingent beneficiaries should be encouraged as a best practice.

[140] Finally, concern was raised over the enforceability of notice requirements where a formal grant of authority is not being sought. The current notice requirements are enforceable in that an ER is unable to make an application to the court for formal authority to administer an estate without having completed this step. This raises the question how the notice requirements would be enforced where formal authority is not being sought. As ALRI recommended in Chapter 2, however, the Act should include a statutory provision providing the court, on application by a beneficiary, with broad powers to enforce the non-performance of a core duty by the ER. The duty to communicate to beneficiaries is a core duty of the ER and compliance with the notice requirements would be contained within the duty to communicate.

RECOMMENDATION 14

Whether or not an estate representative applies for formal authority, the new act should require an estate representative to notify all beneficiaries as to:

- *the identity of the deceased,*
- *the name of the estate representative, and,*
- *the nature of the gift left to them by the deceased's will or intestacy.*

C. Providing a Copy of the Will to Beneficiaries

[141] In Alberta, only residuary beneficiaries receive a copy of the will. Further, this applies only if the ER seeks a formal grant of authority from

[127] See Uniform Trustee Act, s 27(5); definition of "qualified beneficiary" at s 1.

the court and complies with the requirements under the Rules and related forms.

1. OTHER JURISDICTIONS

[142] In 1999 the Law Reform Commission of Nova Scotia recommended that "[w]ills should not be attached to any notice. The notice should refer to the location of the will and its availability for examination."[128]

[143] The proposed new British Columbia probate rules provide that a notice of application for formal authority must:[129]

- contain statements to the effect that the recipient has a right to oppose the application, may or may not have rights under named statutes and that the ER "must account to the beneficiaries or intestate successors of the deceased," and
- include a copy of the will, if any.

[144] In discussing the requirement to provide a copy of the will to beneficiaries, the British Columbia Law Institute said:[130]

> The need for carrying this requirement forward has been considered carefully. Privacy considerations have been weighed, as well as the utility of sending a complete copy of a will in all cases even if the financial interest of a particular notice recipient in the estate is very small. The decisive considerations in the decision to retain the requirement were that recipients who are eligible to make a claim for variation of the will under ... WESA would not be able to properly assess their position without seeing the entire will, and it may be the only means by which charities would be alerted to the fact they have been left a legacy, and to its size and nature.

2. REASONS TO PROVIDE THE WILL

[145] There are a number of reasons why the beneficiaries named in a will should get a copy of the will in addition to the basic information. As Lightman concluded, the old rule of keeping the terms of a gift under a

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[128] Nova Scotia Report at 28.

[129] British Columbia Probate Report at 44-45, subrules 9-10.

[130] British Columbia Probate Report at 45-46.

will secret from the intended recipient unless the will said to disclose is likely to cause injustice, is of no benefit and needs to be reconsidered for modern times.[131]

[146] Lightman also describes the duty to disclose will provisions to a beneficiary as a fiduciary obligation and states that:[132]

> The duties of disclosure to beneficiaries of trustees and executors both of the provisions of the Will or trust affecting them and of the trust affairs and accounts are recent obligations. They are both expressions of the obligations of a fiduciary to make full disclosure. A settlor or testator having recourse to a trust or Will to create a settlement must as part of the price for that privilege accept that beneficiaries need to be informed to monitor and enforce performance by the trustees and executors of their duties so far as they relate to them. If a settlor or testator chooses to create a large body of beneficiaries, he must expect wide dissemination of trust information.

[147] Beneficiaries need more than a bare description of their own gift to be able to properly monitor their interests and understand the impact that other testamentary claims on the estate may have on whether they receive all, some or none of what the deceased intended.[133]

[148] The current requirement that an ER interpret the will, together with completion of other detailed activities, in order to administer the estate puts a great deal of responsibility on the ER. Beneficiaries may want to interpret the terms of a gift directly and verify the accuracy of the ER's assessment. In order to do this, the beneficiary would need to see the terms of the gift in the context of the entire will.

[149] The following comment, obtained during the consultation process, relates to difficulties encountered by will beneficiaries that might be

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[131] Gavin Lightman, "The Trusted Trustees' Duty to Provide Information to Beneficiaries" (Withers Trust Lecture delivered at Kings College, London), (2004) 1 PCB 23 at 34-36 with reference to HAJ Ford & WA Lee, *Principles of the Law of Trusts*, 2d ed (Sydney: Law Book Co, 2003) at 425 and *Scally v Southern Health and Social Services Board*, [1992] 1 AC 294.

[132] Gavin Lightman, "The Trusted Trustees' Duty to Provide Information to Beneficiaries," (Withers Trust Lecture delivered at Kings College, London) (2004) 1 PCB 23 at 40.

[133] This is particularly important in cases where there may not be enough assets in the estate to pay all the deceased's debts and or make all gifts contemplated under the will. See *Halsbury's Laws of Canada*, Wills and Estates (Lexis Canada, 2012 re issue) at HWE-277, which describes the general order of abatement.

resolved if the ER was required to provide basic estate information and a copy of the will to each beneficiary named in the will:[134]

> I work for a charity. Because a charity is not a family member that automatically knows when a person has died, the charity may not know until far too late that they have an interest in an estate. Alternatively, it may be that a will is destroyed to disinherit a charity.

[150] The following point was raised by a lawyer during an estate administration reform discussion hosted by the Canadian Bar Association and relates generally to the issue of how much discretion a ER should have in terms of providing information to those who may be entitled to a distribution of estate property:[135]

> In designing a new estate administration statute, someone should look at the court's existing presumption that an executor's action is correct. This presumption puts the onus on a wronged claimant to prove the executor did something wrong; that can be very difficult. Clearly stating positive executors' duties with court enforcement of performance might be a better way.

[151] Finally, it would be relatively easy for an ER to understand a requirement to provide a copy of the will to any beneficiary named in it as there would be no need for the ER to determine whether a beneficiary is residuary or non-residuary. This classification is not always obvious.

3. REASONS TO WITHHOLD THE WILL

[152] There are also a number of reasons why a copy of the will should not be provided to all beneficiaries. First, the nature of a specific beneficiary's entitlement to estate property is different than a residuary beneficiary's interest. A residuary beneficiary has a greater interest in understanding the entire scheme of gifts set out in the will as the residuary beneficiary takes only after the specific gifts have been dealt with. In comparison, a specific beneficiary will generally only be concerned with the specific gift left to them and need not understand the

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[134] Alberta Justice Legislative Reform, *Results from the Administration of Estates Survey* (June 2010) at 2-3. This was a joint initiative with the Alberta Law Reform Institute. The survey was sent to members of the Canadian Bar Association, Alberta Branch, wills and estates sections.

[135] ALRI Counsel Notes, "CBA Wills, Estates and Trusts" (North Section Meeting at Edmonton, 14 December 2010) [unpublished].

entire scheme of gifts. Further, if the specific beneficiary's gift is no longer available in the estate, the specific beneficiary is entitled to an accounting to explain the absence of the gift. Second, there are concerns about protecting privacy especially in cases where the deceased makes specific gifts to persons or entities who are not family members. Third, ALRI received a suggestion that although it might make the ER's job easier to give all named beneficiaries a copy of the will, doing so may lead to there being too many copies out in circulation, especially if one considers how many wills a charity might receive.

[153] One of the persons canvassed suggested that instead of giving a copy of the will to a non-residuary beneficiary, perhaps the additional notice information should describe the gift and indicate that the non-residuary beneficiary can contact the ER if they have questions. In this way, the non-residuary beneficiary could ask for a copy of the will and the ER could then decide whether or not to provide one.

4. RECOMMENDATION FOR REFORM

[154] There are several benefits that may come from providing the will to all beneficiaries. However, there may also be negative consequences. It is impossible to weigh these factors in the absence of the facts of a specific case. ALRI's initial canvassing of views on a requirement to provide a copy of the will to each beneficiary named in the will was not favourably received. However, there was no objection to providing the will to residuary beneficiaries when an application for formal authority is made, as is the current practice.

[155] In light of ALRI's recommendation in the preceding section, and the comments received on consultation, ALRI recommends that a copy of the will be provided to all residuary beneficiaries. Again, this recommendation would facilitate the beneficiaries' monitoring role. Providing a copy to specific beneficiaries would remain at the discretion of the ER. ALRI further recommends that this provision be moved from the Rules to the new act in order to increase awareness of this requirement.

RECOMMENDATION 15

Whether or not an estate representative applies for formal authority, the new act should require an estate representative to provide a copy of the will to all residuary beneficiaries.

D. Reporting to Beneficiaries

[156] At present there is no statutory or common law requirement for the ER to actively report to beneficiaries. Unless the ER brings a court application for formal authority, beneficiaries may hear nothing from the ER before the estate is distributed. By then, it may be too late for beneficiaries to properly monitor their interests or the ER's actions. As noted earlier, a beneficiary can ask to inspect the accounts and has the right to apply for the accounts to be passed by the court.[136] Again, this requires the beneficiaries to suspect that something may be amiss.

[157] The major reporting requirement is under the Rules which require an ER to prepare and give financial statements to the beneficiaries. Rule 97 requires the accounting "at regular intervals" and at least every two years. Rule 98 specifies the contents of the required financial statements, including an inventory.

1. OTHER JURISDICTIONS

[158] For the most part, other jurisdictions have a similar system of reactive reporting, requiring the ER to report information or give access to the accounts only if a beneficiary asks. In Manitoba, there is a provision that a beneficiary, as an interested person, may request information about an asset or assets of the deceased in addition to what is described in the inventory or valuation.[137]

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[136] Ontario Report at 42-43.

[137] *Court of Queen's Bench Rules*, Man Reg 553/88, r 74.06.1(1): "Any interested person, including a creditor, who requires information about (a) the assets of a deceased; or (b) a specific asset of the deceased; beyond what is described in the inventory and valuation of the property of the deceased ... may provide a written request...."

[159] In England, in general, an accounting or an inventory is only required as a result of an application.[138] Section 25(b) of the UK Act reads "... [An ER,] when required to do so by the court, [must] exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court."

[160] Some Australian jurisdictions only require the passing of accounts when requested by the court.[139] Other jurisdictions require accounts to be passed in every case.[140] Finally, some states require a mandatory passing of accounts only for certain types of ERs.[141]

[161] With respect to law reform proposals, the Ontario Law Reform Commission has recommended that legislation should include a right on the part of beneficiaries to inspect all the records in the possession of the ER relating to the estate. Thus, in addition to accounts, a beneficiary would have the right to inspect all documents concerning the estate that are in the possession or control of the ER. The Commission recommended that the beneficiaries should be able to take a copy of the records at their own expense. The right of access would be available after reasonable notice to the ER.[142]

[162] The Australian National Committee has also recommended that a provision on access to information be included in estate administration legislation. The Committee stated that such a provision would encourage transparency in estate administration and assist with reducing disagreements and litigation.

[163] The Committee raised a point that was not considered by the Ontario Law Reform Commission. Should access by a beneficiary to information be confined to only the information that is relevant to that

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[138] John Ross Martyn & Nicholas Caddick, eds, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, 19th ed (London: Sweet & Maxwell, 2008) at paras 6-15–6-16.

[139] *Administration and Probate Act 1929* (ACT), s 58; *Administration and Probate Act* (NT), s 89; Queensland Act, s 52(1)(b); *Administration and Probate Act 1935* (Tas), s 26. However, a PR in Tasmania who advertises for claimants must file accounts (see s 56).

[140] *Administration Act 1903* (WA), s 43.

[141] *Administration and Probate Act 1919* (SA), s 56(1) (the provision only applies to administrators); *Probate and Administration Act 1898* (NSW), s 85(1AA) (the provision only applies to PRs who are creditors of the estate, who are guardians of a minor beneficiary, where a substantial part of the estate will go to a charity, or who are randomly selected by the courts must file accounts); *Administration and Probate Act 1958* (Vic), s 28(2) (a creditor with a grant must pass accounts).

[142] Ontario Report at 47.

beneficiary's interests? Although this would follow the common law, it might lead to arguments over relevancy. Therefore, the Committee recommended that all beneficiaries be given access to all the information. Access should be granted on reasonable notice to the ER and the cost of obtaining copies should be borne by the beneficiary.[143]

2. RECOMMENDATIONS FOR REFORM

[164] In our Report for Discussion ALRI proposed that ERs be required to give beneficiaries written progress reports at periodic intervals. The content of these reports would be open-ended as it would depend upon the particular circumstances of the administration. However, they should detail the steps taken by the ER to administer the estate. Requiring regular reporting is consistent with the ER creating and maintaining records. It is anticipated that regular reporting will reduce some of the problems that arise when beneficiaries are left in the dark as to the progress of the estate administration.

[165] As well as providing the beneficiaries with information, a regular reporting requirement might motivate ERs to act promptly. Writing to beneficiaries to inform them that you have not taken any steps in administration would probably not be a palatable prospect for most ERs. Thus, regular reporting might help to address the issue of delays in estate administration as well.

[166] The requirement for a progress report could be tied to the completion of certain tasks on the statutory list. However, this does not seem a practical alternative as the time it takes to complete tasks varies with the complexity of the estate and the abilities and inclinations of the individual ER. Given this, ALRI proposed that a progress report be given at six months following the death, at one year following the death, and at subsequent yearly intervals.

[167] ALRI also proposed that beneficiaries of specific gifts be given progress reports. The specific beneficiaries have an interest in seeing that the estate is administered properly and in a timely manner. In addition, communicating with the specific beneficiaries on a regular basis prevents the scenario where the specific beneficiaries are surprised to learn at the

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[143] Queensland Report, vol 1 at paras 11.201-11.206.

end of the administration that they will not be receiving their gifts after all. However, once specific beneficiaries have received their gifts, further progress reports need not be provided to those beneficiaries.

[168] Beneficiaries would still have the right to inspect accounts if needed. However, with regular reports by the ER there should be less need to request formal inspection.

[169] On consultation, there was unanimous support for the recommendation to require the ER to report regularly to beneficiaries. There were, however, differing views with respect to the timeframes proposed. Some thought the timeframes would be useful. Others wondered how meaningful they would be, whether this would add an unnecessary burden to the lay ER and how adherence to the timeframes would be enforced. Still others wondered about the effectiveness of set timeframes where good informal communication already exists between the ER and beneficiaries.

[170] Some consulted also sought a differentiation between the contents of the communication provided to residual beneficiaries as compared to beneficiaries of specific gifts. Weighing privacy considerations, the suggestion was that residual beneficiaries should receive progress on the entire estate, whereas beneficiaries of specific gifts should only receive reports regarding the specific asset. Exceptionally, a beneficiary of a specific gift should get information regarding the entire estate if there is likely to be some encroachment of their gift.

[171] In light of the comments received, ALRI recommends that regular reporting to beneficiaries be included in the legislation as a task of estate administration. We agree that the contents of the communication would depend on whether the beneficiary was the recipient of a specific gift or a residual beneficiary. We acknowledge that in most cases the system of informal communication is working well. Accordingly, we recommend that the form and interval of the reporting be left to the discretion of the ER, but should occur, at a minimum, annually.

RECOMMENDATION 16

The new act should require estate representatives to report regularly to beneficiaries. The form and interval of the reporting should be left to the discretion of the estate representative but should occur annually, at a minimum.

E. Notifying Immediate Family Members Who Are Not Will Beneficiaries

[172] A difficult issue is whether the ER should provide any information regarding the estate administration to immediate family members that the deceased did not name in the will. Immediate family members would include adult children, parents and siblings.

[173] There is no current provision requiring notice to immediate family members not named in a will unless they would have a claim for support under the WSA. The deceased's immediate family have the right to require that a will be proved in a formal court proceeding.[144] This right is not eliminated by the usual probate process (which involves proof of the will in common form) or the passage of time.[145] In Alberta, consistent with other provinces, this right is reflected in rules which state that any person interested in the estate, which includes adult children and heirs on intestacy,[146] can apply to the court for formal proof of the will, or other remedies, to ensure that the estate is being properly administered by the appropriate ER.[147]

1. REASONS TO PROVIDE NOTICE

[174] There are a number of reasons that support providing notice to immediate family members even where they are not beneficiaries under the will. First, as a practical matter, it seems appropriate in the context of concluding the deceased's affairs that the ER would communicate with the adult children, parents and siblings of the deceased, particularly since these persons may be the deceased's successors in interests in non-estate property by virtue of contract, licence or law and may not otherwise know that they have succeeded.

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[144] Rodney Hull & Ian M Hull, *Macdonell, Shead and Hull on Probate Practice*, 4th ed (Toronto: Carswell, 1996) at 317, with reference to *Merryweather v Turner* (1844), 163 ER 907 and *Bell v Armstrong* (1822), 162 ER 129.

[145] *Halsbury's Laws of Canada*, Wills and Estates (Lexis Canada, 2012 Re issue) at HWE-229 with reference to a number of cases at notes 3, 4, 5. See also *Bell v Armstrong* (1822), 162 ER 129 at para 372.

[146] Rules, r 78(b), (g).

[147] Rules, r 75.

[175] Second, even if the deceased's immediate family is otherwise aware of the situation, receiving notice from the ER creates an opportunity for them to provide information to the ER that may facilitate the timely gathering and administration of the estate. For example, these persons may know about property owned by the deceased that is not in or near the place the deceased was living at the time of death, specific creditors, or how to get in touch with beneficiaries who are named in the will.

[176] A third point in support of contacting immediate family is that it may assist the ER to conclude the estate administration in a timely manner in the event of an incomplete or failed testamentary gift because those entitled to such property would already be aware of the administration process. Finally, it may reduce the risk of litigation against the estate during and subsequent to administration if the ER engages in transparent and non-adversarial communications up front with persons who are entitled to challenge a will.[148]

2. REASONS NOT TO PROVIDE NOTICE

[177] On the other hand, there are three main reasons against the proposition that an ER should notify the deceased's immediate family members who are not named in the will. First, it could be unduly onerous and difficult for the ER to identify, locate and notify all these persons. Second, the benefits to be gained by contacting these persons, in terms of supporting the underlying purpose and reasons for giving notice, are not substantial.

[178] Third, in theory it may seem appropriate that an ER should inform the deceased's immediate family of the death and the estate administration. In practice, however, information of this type may lead to discord and litigation. If the deceased's relationship with these persons was such that they would not know of the death, and further, if the deceased did not want to give any property to these persons, why should the ER be responsible for the delivery of such unpleasant messages?

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[148] *Halsbury's Laws of Canada*, Wills and Estates (Lexis Canada, 2012 Re issue) at HWE-229, n 7, which states that "wills may be proved in solemn form, sometimes in ordinary circumstances by executors who wish to obviate the risk of any subsequent attack on a will."

3. NEED FOR REFORM?

[179] In our Report for Discussion, ALRI proposed that it be left to the discretion of the ER whether or not to provide notice to immediate family members who are not beneficiaries under the will. ALRI reasoned that in some cases it will facilitate the administration of the estate for the ER to notify immediate family members. However, in other situations, there might be little, if any, gain; it may even be detrimental to the timely administration of the estate for the ER to take this step.

[180] In consultation, there was support for this proposal. The consensus was that, where there is a will, the ER should not be required to give notice to immediate family members of the deceased who are not beneficiaries under the will. The rationale for this view was that there are already sufficient safeguards to protect this group such that a further notice requirement is not needed. It was pointed out that an immediate family member who is not a will beneficiary may request a copy of the will from the ER, or on refusal, make an application to the court.

F. Communicating with Other Interested Persons

[181] The earlier discussion focussed on beneficiaries and immediate family members. The question here is to what extent an ER should be required to communicate with other interested persons. Interested persons may bring a court application to have the accounts of the ER passed or may apply to the court on a contested matter.[149] However, in some jurisdictions estate administration legislation sets out alternative methods for obtaining information.

1. OTHER JURISDICTIONS

[182] In Manitoba, there is a provision that an interested person may request information about the asset or assets of the deceased in addition to what is described in the inventory and valuation. The provision states:[150]

> 74.06.1(1) Any interested person, including a creditor, who requires information about

[149] Act, s 45; Rules, rr 55, 57.

[150] *Court of Queen's Bench Rules*, Man Reg 553/88, r 74.06.1.

> (a) the assets of a deceased; or
>
> (b) a specific asset of the deceased;
>
> beyond what is described in the inventory and valuation of the property of the deceased ... may provide a written request to the executor or administrator, setting out the interest of the person and the information requested.
>
> 74.06.1(2) Within 21 days after receiving the request, the executor or administrator shall provide the person making the request with the requested information in writing or a statement in writing refusing to provide the requested information and the reasons for the refusal.
>
> 74.06.1(3) The court may, on motion, make an order requiring the executor or administrator to provide the person making the request with the requested information within a specified time, unless the court is satisfied that
>
> (a) the executor or administrator has provided a sufficiently detailed inventory of the assets of the deceased or has disclosed sufficient information about the specified asset of the deceased; or
>
> (b) the request is frivolous, vexatious or made for an improper purpose.

[183] With respect to access to documents by other interested persons, the Australian National Committee recommended that family relief applicants and creditors should have the ability to apply to the court for access to documents.[151] The proposed section reads as follows:[152]

> 616 Access to information held by personal representative — family provision applicants and creditors
>
> (1) This section applies to documents the personal representative is required to keep under section 403.
>
> (2) A person eligible to apply for provision out of the deceased person's estate under [insert local equivalent of the Succession Act 1981, section 41], or a creditor of the estate, may apply to the Supreme Court for access to the documents.

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[151] New South Wales Report, note 48 at paras 6.45-6.47.

[152] New South Wales Report, note 48 at 244.

(3) The Supreme Court may order that the personal representative give the person or creditor access to all or some of the documents as the court considers appropriate.

Examples of giving access—

- *allowing inspection of the documents*
- *providing copies of the documents*

(4) If the Supreme Court orders access under subsection (3), the right to access may be exercised by the person or creditor personally, or by the person's or creditor's agent.

(5) The person or creditor must pay to the personal representative the personal representative's reasonable costs of providing the access.

[184] This type of provision was also recommended by the Ontario Law Reform Commission who noted that these persons have interests which are opposed to the estate and beneficiaries, thus making it appropriate that a court application be made.[153]

2. NEED FOR REFORM?

[185] In our Report for Discussion, our preliminary recommendation was that other interested persons should be able to request information from an ER. The ER should have the discretion to grant or deny their request. In exercising this discretion to provide the information, the ER would weigh the benefits of open communication in the particular circumstances against any potential harm that might arise from communicating the information. Where the ER declines to provide the requested information, the interested person would still be able to apply to the court to gain access to it. In addition, the ER may be required to respond to interested persons under the WSA, and may be required to provide specific information to a person who commences a claim under that legislation.

[186] In consultation, there were few responses to this proposal. Of those that did reply, the response was mixed. Some favoured a provision that would require the ER to communicate with other interested persons, while others did not. ALRI considered this issue at length and affirms that the status quo is adequate.

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[153] Ontario Report at 48.

G. Summary Task List from Chapters 3 and 4

[187] Considering the recommendations we have made for change, the proposed task list for the ER would resemble the list shown below. New items are marked.

Proposal for New Act – Estate Representative Tasks

Disposing of human remains or cremated remains and making funeral arrangements

- Identifying who has the authority to control the disposition of human remains or cremated remains.
- Identifying who has the authority to make arrangements for funeral, memorial or other services.

Identifying the estate, including

- Arranging with a bank, trust company or other financial institution for a list of the contents of a safety deposit box. (no change)
- Determining the full nature and value of property and debts of the deceased as at the date of death and compiling a list, including the value of all land and buildings and a summary of outstanding mortgages, leases and other encumbrances. (no change)
- Applying for any pensions, annuities, death benefits, life insurance or other benefits payable to the estate. (no change)
- Preparing an inventory of the estate assets and liabilities. (**new**)

Communicating with beneficiaries, including

- Determining the names and addresses of those beneficially entitled to the estate property. (modified)
- Notifying all beneficiaries as to the identity of the deceased, the name of the estate representative, whether or not the estate representative is applying to the court for formal authority, and the nature of the gift left to the beneficiary by the deceased's will or intestacy. (**new**)
- Where there is a will, providing a copy of it to all residuary beneficiaries. (**new**)
- Reporting regularly to beneficiaries, at a minimum, annually. (**new**)

Administering the estate, including

- Creating and maintaining records. (**new**)
- Examining existing insurance policies, advising insurance companies of the death and placing additional insurance, if necessary. (no change)
- Protecting or securing the safety of any estate property. (no change)

- Providing for the protection and supervision of vacant land and buildings. (no change)
- Arranging for the proper management of the estate property, including continuing business operations, taking control of property and selling property. (no change)
- Retaining a lawyer (where necessary) to advise on the administration of the estate, to apply for a grant from the court or to bring any matter before the court. (no change)
- Instructing a lawyer in any litigation. (no change)
- Providing financial statements. (**new**)
- Any other duties required by law or under a valid will. (**new**)

Paying the debts, including

- Arranging for the payment of debts and expenses owed by the deceased and the estate. (no change)
- Determining whether to advertise for claimants, checking all claims and making payments as funds become available. (no change)
- Taking the steps necessary to finalize the amount payable if the legitimacy or amount of a debt is in issue. (no change)
- Determining the income tax or other tax liability of the deceased and of the estate, filing the necessary returns, paying any tax owing and obtaining income tax or other tax clearance certificates before distributing the estate property.(no change)

Distributing the estate to the beneficiaries, including

- Advising any joint tenancy beneficiaries of the death of the deceased. (no change)
- Advising any designated beneficiaries of their interests under life insurance or other property passing outside the will. (no change)
- Administering any continuing testamentary trusts or trusts for minors.(no change)
- Preparing the legal representative's financial statements, a proposed compensation schedule and a proposed final distribution schedule. (no change)
- Distributing the estate property in accordance with the will or intestate succession provisions. (no change)

CHAPTER 5

Getting Started – Initial Problems Encountered in Administering an Estate

A. Introduction

[188] Preliminary consultations revealed a class of difficulties that have resulted in some initial delays in administering the estate. These difficulties include obtaining the release of preliminary information from banks or other financial institutions and, gaps in authority in administering an estate. This chapter looks at these preliminary difficulties and assesses possible solutions.

[189] In ALRI's Report for Discussion, we proposed to provide all ERs with the statutory authority to act from death. In summary, ALRI recommended that, in the absence of an ER who is acting under a will, the person or persons at the highest level in the hierarchy of those eligible to administer would have authority as ER from the time of the deceased's death. This would address these preliminary difficulties by providing all ERs with the clear authority to obtain preliminary information as well as closing the gap in authority to administer that currently results where there is no ER acting under a will.

[190] While this proposal helped to resolve these preliminary difficulties, a number of additional problems were raised on consultation. For example, some were concerned about the potential for abuse. Others were concerned about the viability of this proposal in a situation where there were multiple persons with the potential to act as ER. Still others raised evidentiary concerns about ensuring that a person was the highest in the hierarchy. Accordingly, in this Final Report, ALRI is no longer recommending that all ERs be provided with the statutory authority to act from death. In this chapter we reconsider what, if anything should be done to facilitate the release of preliminary information to ERs and to resolve the gap in authority on administration. We also consider concerns raised around access to assets held by financial institutions.

B. Release of Preliminary Information

1. INTRODUCTION

[191] Some ERs experience difficulty in obtaining information about the deceased's assets from financial institutions. Financial institutions cite privacy concerns or concerns about the basis of the ER's authority before releasing the relevant information. This is reportedly a particular problem where there is no will appointing an ER.[154]

[192] Financial institutions may release information informally to an ER on the basis of their relation to the deceased or on the production of a will. However, in some cases, they may insist that an ER have court authorization that they are the ER (a formal grant) or court validation of the will before they release preliminary information. The difficulty is that, under the current legislation, an application for a formal grant or court validation of a will requires the completion of an inventory of assets of the deceased's estate and some preliminary information concerning the assets in the estate may be required to complete this inventory. In addition, preliminary information concerning the assets in the estate may be needed in order to determine what funeral arrangements can be reasonably made and to inform the beneficiaries.

[193] As an initial observation, it is important to note which level of government has regulatory authority over which type of financial institution. The federal government has jurisdiction over banking according to the *Constitution Act, 1867*.[155] However, this does not mean that banks are exempt from provincial law. Meanwhile, other financial institutions, such as credit unions and caisses populaires, are largely regulated by provincial governments.

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[154] The law has traditionally distinguished between two types of ERs — executors and administrators. An *executor* is a person appointed by the deceased by will to administer the deceased's estate. The executor's authority comes from the will rather than from the court and so the executor may start to act without first obtaining a grant of authority from the court. An *administrator* is a person appointed by the court to administer an estate where there is no will or, for some reason, no executor who is willing and able to act. An application to the court for a formal grant of authority may be needed to allow an administrator to complete even the preliminary tasks associated with an estate.

[155] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(15), reprinted in RSC 1985, App II, No 5.

2. PRIVACY CONCERNS

[194] One of the ER's tasks is to prepare an inventory of the estate. Preparing the inventory requires the ER to obtain information about the deceased's finances from banks. The feedback from the consultations was that some financial institutions object to providing this information to an ER on the basis of privacy concerns.

[195] In terms of privacy legislation the *Personal Information Protection and Electronic Documents Act* governs a bank's ability to share information, as banks are federally regulated.[156] Principle 4.3.6 of Schedule 1 of PIPEDA contemplates that consent to disclose could be given by an *authorized* representative. In Alberta, the release of information by provincially regulated bodies, such as credit unions, is governed by the *Personal Information Protection Act*.[157] Section 61(1)(d)(i) provides:

> Exercise of rights by other persons
>
> 61(1) Any right or power conferred on an individual by this Act may be exercised
>
> ...
>
> (d) if the individual is deceased
>
> (i) by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate;

[196] The question is when is an ER an "authorized" representative or acting as an individual's personal representative under the federal or provincial legislation, respectively? There does not appear to be any order of either the Federal or Alberta Privacy Commissioner that has addressed this issue.

[197] If one considers the source of authority, an executor named in the will is "authorized" by the will to act as a representative of an estate. Where there is no will or no executor acting under a will then it would be up to the court to "authorize" a person by issuing a grant. From the consultations it would appear that there are two different scenarios where a bank or other financial institution may refuse to provide information on the basis of privacy concerns:

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[156] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

[157] *Personal Information Protection Act*, SA 2003, c P-6.5.

- When a person is authorized as an ER.
- Where authorization as an ER is pending.

Each of these will be examined in turn.

a. When a person is authorized as an estate representative

[198] Even if an ER has been named in the will, a financial institution may be reluctant to act because of the risk of a challenge to the validity of the will. In the view of the ALRI Project Advisory Committee, this was not a very common scenario. Where it does occur the issue should be addressed by education for financial institutions, so that they are clear when a person is authorized. The Committee noted that there might be some practical concerns about how to educate financial institutions.

b. Where authorization as an estate representative is pending

[199] The more difficult case is the catch-22 scenario where the authority of an ER depends on a formal grant of authority and the financial institution is unwilling to provide the information needed in order to complete the court application.

[200] Under the current legislation, there are ways to work around this problem. For example, a nominal figure can be entered into the inventory, until the grant is issued and the real figure can be ascertained. Alternatively, a reasonable estimate can be entered based on bank statements at the deceased's home or available through Internet access.

[201] Where these practical alternatives are not available, another possibility would be for the person seeking the information to apply to the court for an interim order for a limited appointment as ER in order to obtain the necessary information to facilitate the grant application procedure.

[202] We also note that our recommendation in Chapter 3 that the filing of a inventory with the court not be required would go some way to alleviating the potential difficulties in this area.

3. IS REFORM NEEDED?

[203] When ALRI first considered this issue, it noted the current law provides avenues for ERs who have difficulty accessing information from

banks without a formal grant of authority. Our preliminary conclusion was that the current law provides an appropriate response. We noted that to the extent that change is needed it would be best brought about through education.

[204] Subsequent consultations revealed a varied experience. Many ERs reportedly experience no difficulty in obtaining the necessary preliminary information from financial institutions. Others continue to experience problems in obtaining information from banks and other financial institutions.

[205] The vast majority of those consulted concurred with our preliminary assessment that the current law provides adequate alternatives to obtain the information needed to complete applications for administration. Others made a number of suggestions for reform. First, it was suggested that clear guidelines for financial institutions should be developed concerning the type of information that should be released, in what manner, to whom, and on what basis. Second, it was suggested that a form be created which would affirm that the ER has conducted the requisite due diligence to find the latest will, that the will presented is the final one or that the ER is the highest in priority to apply. Lastly, immunity should be granted to financial institutions that release information on the basis of such a document.

[206] ALRI appreciates receiving these suggestions. Given that we continue to hear that the majority of those consulted do not report a problem in this area and that the existing law provides adequate means to address difficulties in accessing information, ALRI is hesitant to recommend further change in this area. Accordingly, we continue to emphasize the need for education, rather than a legislative response.

C. Access to Assets Held by Financial Institutions

1. RELEASE OF ASSETS

[207] During the consultations there were also complaints regarding the length of time it takes for a financial institution to release assets to either an ER or beneficiary for distribution. This problem is separate and distinct from the type of difficulties that may delay the start of the estate

administration process, but is briefly discussed here as it also concerns banks and other financial institutions.

[208] It is not clear from the submissions how widespread the problem is or what length of time would be considered reasonable. The problem appears to be that banks and other financial institutions have developed internal procedures – such as requiring that a request go through its estate department at head office – and this adds weeks to what should otherwise be a straight forward request.

[209] Where a bank is presented with a formal grant of authority, then one would expect the delays would be relatively short (some procedures would be expected to establish the validity of the order and the identity of the ER or the beneficiary). While the *Bank Act* and the *Credit Union Act* are silent about the types of procedures that should be followed in giving an ER access to the assets of an estate, they do provide detail with respect to the transmission of assets to a named beneficiary.[158] For example, where the asset is a deposit or other property held as security, section 460 of the *Bank Act* requires an affidavit or declaration signed by the beneficiary and an authenticated copy under the seal of the court or authority of the will, testamentary instrument, grant of probate or other similar document.[159] By analogy, one would expect that if similar documents were presented by an ER then the assets should be released.

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[158] *Bank Act*, SC 1991, c 46; *Credit Union Act*, RSA 2000, c C-32, s 116.

[159] *Bank Act*, SC 1991, c 46, s 460:

> Transmission in case of death
>
> 460. (1) Where the transmission of a debt owing by a bank by reason of a deposit, of property held by a bank as security or for safe-keeping or of rights with respect to a safety deposit box and property deposited therein takes place because of the death of a person, the delivery to the bank of
>
> (a) an affidavit or declaration in writing in form satisfactory to the bank signed by or on behalf of a person claiming by virtue of the transmission stating the nature and effect of the transmission, and
>
> (b) one of the following documents, namely,
>
> (i) when the claim is based on a will or other testamentary instrument or on a grant of probate thereof or on such a grant and letters testamentary or other document of like import or on a grant of letters of administration or other document of like import, purporting to be issued by any court or authority in Canada or elsewhere, an authenticated copy or certificate thereof under the seal of the court or authority without proof of the authenticity of the seal or other proof, or
>
> (ii) when the claim is based on a notarial will, an authenticated copy thereof,
>
> is sufficient justification and authority for giving effect to the transmission in accordance with the claim.
>
> Idem
>
> (2) Nothing in subsection (1) shall be construed to prevent a bank from refusing to give effect to a transmission until there has been delivered to the bank such documentary or other evidence of or in connection with the transmission as it may deem requisite.

[210] However, where there is something short of a formal grant of authority it may be reasonable for banks to refuse to release assets or to put in place a system of guarantees and undertakings in order to limit their potential liability and the risk of fraud. Typically, where there is something short of a formal grant of authority a bank will pay amounts directly to creditors as needed to manage the estate. It is also possible to obtain an emergency grant of authority from a court where, for example, a mortgage payment must be made or the estate will have to sell the house where a dependent of the deceased is still living.

2. NEED FOR REFORM?

[211] Inevitably there will be some delay resulting from compliance with a financial institution's internal procedures before estate assets can be released. In our Report for Discussion, we concluded that while there might be some room for financial institutions to streamline or more clearly determine appropriate procedures and safeguards in the release of estate assets, legislative reform is not warranted. In our subsequent consultation, there was general agreement that legislative reform is not needed in this area. Accordingly, ALRI affirms our original recommendation.

[212] If banks want to pay out assets informally on the basis of some indemnity or undertaking, this is a matter of policy for financial institutions. Currently banks, as a matter of policy, will sometimes release assets below a certain dollar figure (usually around $30,000) without a formal authority where they know either the deceased or the ER and where an indemnity is signed. The amount and the procedure vary between banks and amongst branches.

D. Waiting Period

[213] Section 3 of the Act provides that the court may not grant an application to administer an estate within 14 days of death. There is no clear policy reason for this requirement and similar waiting periods are not commonly imposed in other jurisdictions.[160] Moreover, the waiting

[160] Manitoba and New Brunswick are the only other provinces that impose a similar waiting period: *Court of Queen's Bench Rules*, Man Reg 553/88, r 74.04(4); *Probate Rules*, NB Reg 84-9, s 2.02(1)(b).

period entrenches a gap in authority at the outset of the administration process.

[214] In ALRI's Report for Discussion, we recommended that the 14 day waiting period before an application for a grant of administration may be made be eliminated. We continue to see the merit in this proposal.

RECOMMENDATION 17

The new act should eliminate the waiting period before an application for a grant of administration may be made.

E. Vesting and Relation Back

[215] In ALRI's Report for Discussion, we also considered the gap in an administrator's authority to deal with both personal and real property between the date of death and the date a grant of administration is obtained.[161] In other jurisdictions, this gap has been addressed through statute by either deeming the administrator to have the authority from the date of death or by having the property vest in the court or other government entity until the administrator is appointed. ALRI considered this issue and determined that both legislative solutions posed difficulties and would only be of limited use in practice. Accordingly, ALRI has chosen not to make a statutory recommendation to address this particular gap in authority.

[161] Alberta has passed legislation to prevent real property vesting directly in intestate beneficiaries. Section 2(1) of the *Devolution of Real Property Act*, RSA 2000, c D-12 provides that real property vests in the same manner as personal property. While this change avoids the problem of property passing directly to the beneficiaries, it does not address the problem of the initial gap in an administrator's authority.

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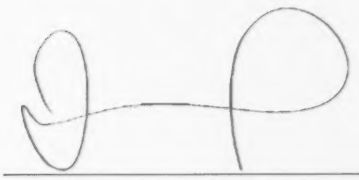

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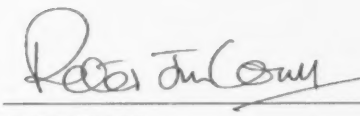

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